TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

No. 223.

ADELAIDE M. HARDING, PLAINTIFF IN ERROR,

vs.

GEORGE F. HARDING.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED APRIL 6, 1904.

(15,208.)

(19,296.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 222.

ADELAIDE M. HARDING, PLAINTIFF IN ERROR,

vs.

GEORGE F. HARDING.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

INDEX.

	Original.	Print.
Caption	a	1
Transcript from superior court	1	1
Complaint	1	1
Demurrer	3	2
Order dismissing demurrer, &c	4	2
Answer	4	2
Petition for separate maintenance	15	8
Counter-statement of Adelaide M. Harding	19	10
Order of reference	28	14
Decree of July 26, 1897	30	15
Supplemental answer	38	19
Decree of December 8, 1899	41	21
Findings of fact	45	22
Conclusions of law	47	23
Decree of divorce	48	24

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 17, 1904.

	Original.	Print
Motion to associate M. L. Ward as attorney for plaintiff.	49	24
Bill of exceptions	49	25
Testimony of Wm. H. Bailhache	49	25
George F. Harding	52	26
George Puterbaugh	67	34
Stipulations as to evidence	73	37
Testimony of Beatrice Harding (part omitted in printing)	76	38
G. T. Van Meter (" " ")	77	38
Abner C. Harding (" " ")	80	39
Amelia Neiderland (part omitted in printing)	81	39
George F. Harding, Jr. (part omitted in printing)	83	39
Beatrice Harding (part omitted in printing)	86	39
George F. Harding (recalled) (part omitted in printing)	92	39
Defendant's Exhibit A—Record from the circuit court of Cook county, Illinois, in case of Adelaide M. Harding vs. George F. Harding	113	44
Caption	113	44
Bill of complaint	114	44
Amendment to bill	130	52
Further amendment	132	53
Answer	133	54
Amendment to answer	162	68
Replication	166	70
Demurrer to amended bill	168	71
Petition for separate maintenance	169	72
Decree of supreme court of Illinois, June 17, 1899	172	73
Mandate from supreme court of Illinois	175	75
Decree of July 1, 1890	177	76
Order as to appeal	180	77
Order on demurrer, &c	181	77
Order on mandate	181	78
Order of reference, May 10, 1893	182	78
Order of reference, April 15, 1896	183	79
Order of July 17, 1896	185	80
Decree of July 26, 1897	186	81
Decree of December 8, 1899	192	84
Certificates to record	195	85
Testimony of Adelaide M. Harding (part omitted in printing)	197	86
Adelaide Harding (part omitted in printing)	325	86
Susie Harding (" " ")	382	86
Kate Coughlin (" " ")	428	86
Maggie Galvin (" " ")	434	86
Anna Galvin (" " ")	445	86
Geo. W. Brayton (" " ")	451	87
J. J. Thiesen (" " ")	452	87

	Original.	Print
Testimony of Edward Iverson..(part omitted in printing)..	456	87
Wm. Reed.....(" " ")..	459	87
Wm. Reed.....(" " ")..	462	87
Clara E. Taylor...(" " ")..	465	87
Catherine Wren..(" " ")..	468	87
Arthur C. Blayney.(" " ")..	469	88
Wm. A. McLean..(" " ")..	472	88
Benjamin Thompson (part omitted in printing).....	476	88
Charles B. Wright (part omitted in printing)..	477	88
Edward P. Harris.(" " ")..	482	88
R. W. Iverson....(" " ")..	483	88
Benj. Thompson (recalled) (part omitted in printing).....	485	88
Wm. Root .....(part omitted in printing)..	486	88
Elias R. Bowen..(" " ")..	486	88
Robert Boyd.....(" " ")..	487	89
Ellen Finter. ...(" " ")..	489	89
Clement Le Seur..(" " ")..	492	89
Ellen Le Seur....(" " ")..	495	89
Alfred P. Wright.(" " ")..	496	89
Wm. O. Cutter...(" " ")..	498	89
Laura Hammond.(" " ")..	499	89
Frank L. Union..(" " ")..	500	89
Harriet Union....(" " ")..	502	89
Mrs. Morse.....(" " ")..	503	90
Victor M. Harding.(" " ")..	505	90
Certificate of evidence in Illinois case, &c.....	590	91
Testimony of Mrs. A. R. Von Louis (part omitted in printing).....	593	93
Abner C. Harding (part omitted in printing)..	594	93
Geo. F. Harding, Jr. (part omitted in printing).....	656	93
Beatrice Harding (part omitted in printing)..	724	93
Amelia Niederland (" " ")..	779	93
George R. Harding (" " ")..	825	93
Victor M. Harding (recalled) (omitted in printing).....	1005	—
Specifications in which the findings are not supported by the evidence.....	1013	95
Specifications of error.....	1016	97
Judge's certificate to bill of exceptions.....	1031	104
Certificate to judgment roll.....	1032	104
Nature of intention to move for new trial.....	1032	104
Motion for new trial and order denying same.....	1033	105
Notice of appeal.....	1034	105
Affidavit of service.....	1035	106
Clerk's certificate.....(omitted in printing)..	1036	—
Receipt for copy of transcript.....	1038	101
Docket entries.....	1039	107
Order denying rehearing.....	1046	117

	Original	Print
Judgment	1047	111
Clerk's certificate	1048	112
Petition for writ of error	1049	112
Assignment of errors	1051	113
Writ of error	1055	115
Citation	1057	116
Affidavit of service of citation	1058	116
Bond on writ of error	1059	117
Designation by plaintiff in error of parts of record to be printed and acceptance of service of same	1061	118
Designation by defendant in error of parts of record to be printed and affidavit of service of same	1067	120

a Los Angeles District, No. 1170.

In the Supreme Court of the State of California.

GEORGE F. HARDING, Respondent and Plaintiff,
vs.
ADELAIDE M. HARDING, Appellant and Defendant.

Transcript on Appeal.

Works & Works, attorneys for defendant and appellant.
M. L. Ward, attorney for plaintiff and respondent.

Filed Sep. 10 1901.

GEO. W. ROOT, *Clerk*,
By —— ——, *Deputy*.

1 In the Supreme Court of the State of California.

GEORGE F. HARDING, Respondent and Plaintiff,
vs.
ADELAIDE M. HARDING, Appellant and Defendant.

Transcript on Appeal.

Judgment roll.

Title of Court and Cause.

Complaint.

The plaintiff above named complains of the defendant and alleges:

2 First. That in the month of November, 1855, at the city of Peoria, in the county of Peoria, State of Illinois, the plaintiff and defendant intermarried, and ever since then have been and now are, husband and wife.

Second. That the plaintiff is now and has been a resident of the State of California for the period of over one year, and of the county of San Diego over three months, immediately preceding the commencement of this action, and that plaintiff has been a resident of said county and State since the 15th day of May, 1895.

Third. That on or about the month of February, 1890, the defendant, disregarding the solemnity of her marriage vow, wilfully and without just cause, deserted and abandoned the plaintiff, and ever since has been and still continues so to wilfully and without just

cause desert and abandon the said plaintiff, and to live separate and apart from him, without any sufficient cause or reason, and against his will and without his consent.

Wherefore, the plaintiff demands judgment, that the bonds of matrimony between himself and the defendant be dissolved, and for the costs of this action.

PUTERBAUGH & PUTERBAUGH,
Attorneys for Plaintiff.

(Duly verified.)

3 Endorsed: Filed Aug. 31, 1897. Will H. Holcomb, clerk. By Walter M. Edwards, deputy.

Title of Court and Cause.

Demurrer.

Now comes the defendant in the above entitled action and demurs to plaintiff's complaint herein on the following grounds, to-wit:

The said complaint does not state facts sufficient to constitute a cause of action.

WORKS, WORKS & INGLE,
Attorneys for Defendant.

Endorsed: Received copy of within this 17th day of November, 1897. Puterbaugh & Puterbaugh, attorneys for plaintiff. Filed Nov. 17, 1897, at 10 min. past 10 a. m. Will H. Holcomb, clerk. By T. J. Storey, deputy.

4 Title of Court and Cause.

Minutes of Court of June 22, 1900.

On this day comes the plaintiff by his attorneys, Messrs. Puterbaugh & Puterbaugh, and defendant's demurrer to plaintiff's complaint is by the court dismissed for want of prosecution. Thirty days are allowed defendant in which to answer such complaint. Notice of such ruling is waived.

Title of Court and Cause.

The Answer of the Defendant, Adelaide M. Harding, to the Complaint of the said Plaintiff, George F. Harding.

First. The defendant admits that in the month of November, 1855, at the city of Peoria, in the county of Peoria, and State of Illinois, the plaintiff and defendant intermarried, and ever since then have been and now are husband and wife.

Second. The defendant upon information and belief denies that the plaintiff is now, or at the time of the commencement of this suit was a resident of the State of California. And this defendant upon information and belief denies that said plaintiff has been a resident of the State of California for a period of over one year and of the county of San Diego over three months immediately preceding the commencement of this action. And this defendant, upon
5 information and belief, denies that the plaintiff has been a resident of the said county and State since the fifteenth day of May, 1895. And this defendant denies that the said plaintiff is or ever has been a resident of said county of San Diego and State of California.

Third. This defendant denies that on or about the first of February, 1890, or, at any other time, the defendant disregarding the solemnity of her marriage vows, or wilfully or without just cause, deserted or abandoned the plaintiff. And this defendant denies that she continues wilfully or without just cause to desert or abandon the said plaintiff or to live separate and apart from him without any sufficient cause or reason or against his will or without his consent.

Fourth. This defendant alleges that on or about the seventeenth day of May, A. D. 1877, there was passed by the General Assembly of the State of Illinois an act, entitled, "An act in relation to married women;" and that said act was afterwards on the seventeenth day of May, A. D. 1877, duly approved and signed by the governor of the State of Illinois, and that said act became in force as the law of the State of Illinois on the first day of July, 1877; that said act has been thence hitherto since the first day of July, 1877, and still is, in force in said State of Illinois unrepealed as the law of the State of Illinois; and that said act is in the words and figures following, that is to say:

6 SECTION 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly, That married women who, without their fault, now live or hereafter may live separate and apart from their husbands, may have their remedy in equity in their own names, respectively, against their said husbands for a reasonable support and maintenance while they so live, or have so lived separate and apart; and in determining the amount to be allowed, the court shall have reference to the condition of the parties in life, and the circumstances of the respective cases; and the court may grant allowance to enable the wife to prosecute her suit, as in cases of divorce.

SECTION 2. Proceedings under this act may be instituted in the county where either the husband or wife resides, and the wife shall not be required to give security for costs in any such proceeding.

That heretofore and while the said act was in force as aforesaid, and on the third day of February, 1890, this defendant (who was recently there-fore on or about said third day of February, 1890, separated from her husband without her fault and by reason of his

fault and misconduct, and who was then, without her fault living separate and apart from her husband, the said plaintiff, in the city of Chicago, in the county of Cook, and State of Illinois), filed her certain bill of complaint in equity, in pursuance of said statute, in the circuit court of Cook county, in the State of Illinois, which court was then and there a court of
7 general jurisdiction in the said county of Cook, and State of Illinois, against the said George F. Harding, her husband, the defendant, who then resided in said county of Cook and State of Illinois, in which this defendant, as oratrix and complainant, alleged against the said George F. Harding, as defendant, in substance, among other things, that on November 7th, 1855, at Peoria, Illinois, she was married to said George F. Harding; that in 1862 they came to reside in Chicago, aforesaid, where they have since resided, and still at the commencement of said last mentioned suit resided; that as the fruit of said marriage there had been born seven children, who were then all living, and whose names and ages were in said bill, respectively stated; that this defendant, the oratrix and complainant in said bill, had always conducted herself toward her said husband and children as a true, loving, faithful and devoted wife and mother; that she had at all times and in all things, made the comfort and happiness of her husband, and the education and welfare of her children, the paramount concern of her life, and had devoted herself always and unreservedly, and almost exclusively, to the duties connected with her family and with her home. And in said bill she further alleged that upon the death of his father, July 19, 1873, the said George F. Harding inherited a large fortune, and since that time he has been a man of large wealth, amounting to a million dollars or more, and has been in receipt of a large and certain income; and that since 1872 they have lived at number
8 2536 Indiana avenue, in one of the best residence localities in Chicago, aforesaid; that until recent years she and her said husband lived happily together; that in October, 1888, the said George F. Harding, defendant in said bill of complaint, began toward her a systematic course of unkind, abusive and cruel treatment, which necessarily and inevitably rendered her life unhappy and miserable, and which he continued with increasing severity and cruelty until the first day of February, 1890, when, in consequence of such treatment, and after exhausting all means of reconciliation, she left the defendant's house, and has ever since lived separate and apart from him.

That in and by said bill of complaint last mentioned this defendant, as oratrix and complainant, further alleged that about the middle of October, 1888, the said George F. Harding, without any cause whatever, left the room and bed they jointly occupied, and has ever since occupied a separate room and bed, and has ever since refused to live or cohabit with her as his wife; that about the same time he forbade all the merchants with whom she had been accustomed to trade upon credit to give her any further credit whatever;

and since about the middle of October, 1888, he had deprived her of the use of the horses and carriages; that about October 13, 1888, he broke open a certain iron safe in the house, where she lived, in which she was accustomed to keep her jewelry, various personal papers and correspondence and valuables, and took there-
9 from all her jewelry and papers; that since October, 1888, he had withdrawn himself entirely from her society and companionship and had treated her with studied neglect and indifference; and had repeatedly in the presence of their children denounced her as a thief and a liar, and had berated her with violent and abusive language; and endeavored to persuade and force their children to take sides against her and to join and uphold him in his unkind and abusive treatment of her, and had endeavored to alienate the children from her for the purpose of wounding and crushing her through her love for them.

And that in and by said bill of complaint this defendant, as complainant therein, further alleged that said defendant therein, the said George F. Harding, during the year prior to November, 1889, had repeatedly threatened to discharge all the servants, and commanded them to take their orders and directions from him, and to disregard the orders and directions of his wife; and as far as possible incited them to be insubordinate and disrespectful and insulting to her, and deprive her of that position of authority and control in the household to which she was entitled; and that about the middle of November, 1889, putting into execution the threats so frequently made before, he discharged and sent away all the servants except the coachman, who was retained for his accommodation only, and except the woman to wash and iron, who had been permitted to
10 come two days in the week as formerly; that in consequence of such discharge of the servants this defendant, the complainant in said bill, though wholly unused to such exertions, was compelled as far as possible to perform the labor and drudgery about the house for which three servants had theretofore been employed and deemed necessary, and was thus compelled to, and did cook and clean, build fires and carry coal, and perform whatever menial service which was necessary to be done about the house so far as she was able; and that the unusual exposure, exertion and lifting brought upon her an attack of lumbago, followed by influenza and other complications, and she became seriously and painfully sick and confined to her bed, and under the care of her family physician for the space of about two weeks; that during all this time her said husband never came near her, and told the children that she was shamming, and found fault with certain of the children for taking care of her while she was thus prostrated with sickness; that at the same time he discharged the servants, as aforesaid, he also forbade his wife, this defendant, to purchase supplies for the table upon credit; and forbade the dealers in such supplies, with whom they had been accustomed for years to trade, to furnish anything on credit; and that in many other ways and particulars the said defend-

ant had wronged, abused and mistreated this defendant, his wife, and contributed to render her life in the house with him miserable and unendurable; and that the treatment to which she had been subjected as aforesaid by her said husband had impaired her health
11 and threatened her life, and had destroyed her happiness, and had necessarily rendered her life in the same home with him miserable and unendurable; that her said husband's conduct towards her had grown continually more cruel, humiliating and unjust; and finally, on the third day of February, 1890, she having endured the defendant's said treatment for more than a year, and despairing of any amelioration in his conduct, withdrew from his house, and ever since then has been and still at the time of the filing of said bill of complaint was living separate and apart from him without fault on her part.

And this defendant in and by said bill of complaint, as oratrix and complainant, prayed the premises considered, that George F. Harding, whom she made defendant in her said bill of complaint, might be summoned and might answer make to said bill, his answer under oath being waived, and that upon a final hearing thereof it might be found and decreed that she was living separate and apart from him without fault on her part, and that her said husband, defendant in said bill, might be decreed to provide her with support and maintenance in accordance with the said statute in such case made and provided, during the time she had so lived or might continue to so live separate and apart from him, to be paid or secured to her by her said husband in such manner as might be just and reasonable, and for such other, further or different relief as the facts might warrant, and to equity appertains.

12 And this defendant further answering says that such further proceedings were had in said circuit court of Cook county, in the State of Illinois, and in said suit therein last mentioned, that afterwards, and on the nineteenth day of March, A. D. 1890, the said George F. Harding, as defendant to said bill of complaint last mentioned, appeared and filed his answer in said court last mentioned, and in and by said answer he admitted the allegations of said bill as to their marriage and the birth of said children, and that they had at that time resided in the said city of Chicago, in the said county of Cook and State of Illinois, since November, 1862, for nearly twenty-eight years; and in and by such answer denied the allegations and charges of misconduct in the said bill of complaint contained.

That such further proceedings were had in said court last mentioned in the suit therein last mentioned, that afterwards on the second day of May, 1890, this defendant, Adelaide M. Harding, as complainant in said bill of complaint, by leave of said court last mentioned, filed in said court last mentioned her certain amendment to the said bill of complaint therein, in and by which said amendment she amended her said bill of complaint by further alleging, among other things that the said George F. Harding both before and

since October, 1888, at Chicago, in said county of Cook aforesaid, and at divers other places in Illinois and elsewhere, had committed
13 adultery with a woman sometimes going under the name of Mrs. A. R. Louis, and sometimes under the name of Madam von Louis, or Madam von Louiy; and that this de-von Louis, or Madam von Louiy; (who, the evidence hereinafter mentioned showed also, went under the name of A. R. Lingard, or Madame Lingard·); and that this defendant, as such complainant, first came to the knowledge thereof by accident in August and September, 1888; and that about October, 1888, her said husband became aware of the fact that she, this defendant, possessed such knowledge. That in and by said bill of complaint as so amended this defendant further charged upon information and belief that her said husband, the defendant therein, had committed adultery with divers other persons whose names were to her unknown, with the exception thereinafter stated, the time and places thereof being also unknown to her.

That such further proceedings were had in said last named court, in said last mentioned cause, that afterwards, on the seventh day of May, 1890, the said George F. Harding, as defendant, answered the said bill of complaint of this defendant as so amended, and thereby reaffirming all the statements and allegations of his original answer to said bill denied the said allegations of said bill as amended as aforesaid.

That such further proceedings were had in said court last
14 named, in said suit last mentioned, that this defendant as complainant therein, filed her replication to the said answer of the said defendant, and thereby the issues in the said suit last mentioned upon the said pleadings therein were made up; that afterwards such further proceedings were had that a large amount of evidence was taken by depositions under and in accordance with the practice of said last named court, in the said cause last mentioned, by and on behalf of this defendant as complainant, to sustatin the allegations of her said bill of complaint as so amended and the issues in said suit last mentioned on her behalf.

That afterwards, and while the said suit last mentioned was still so pending in said circuit court of Cook county, as aforesaid, to-wit, on the 3rd day of January, 1893, the same being one of the days of the December term, A. D. 1892, of said last named court, the said George F. Harding, in his own proper person and by his solicitor, appeared in said last named court in said suit last mentioned, and presented to the said court in open court in said last mentioned suit, his certain statement in writing by him duly signed, and filed the same in said court in said last mentioned cause, and made the same a part of the record of said last mentioned suit in said last named court; and that said statement in writing last mentioned was as follows, that is to say:

15 "STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County.

ADELAIDE M. HARDING }
vs.
GEORGE F. HARDING. }

Petition for Separate Maintenance.

"When this suit for separate maintenance began, the plaintiff had "in her hands a large sum of money and property, convertible into "money and applicable to her support, received from me and from "my family; and when this shall be expended and applied to her "support, for which it was given her, at that time whatever the re- "sult of this case, it would be my duty as I understand it, to give "her further support; and this I should do whatever the result of "this case, and without reference to whether she can exact it or not.

"I am confident of making good my defense, if the case must be "tried, but the considerations suggested make the fact that the "plaintiff may prove to have no real cause of action immaterial.

"Hence it seems to me to be wise in the interest of my family and "of peace, if I can put an end to this litigation to do so by consent-
"ing to a decree giving her for separate maintenance such a
16 "sum as the court may find to be just and equitable, after a
"due consideration of the evidence bearing upon the amount "of the allowance. Hence I give my consent that a decree for sepa- "rate maintenance shall be entered in favor of the plaintiff without "a finding or trial of the issue in this case.

"That this consent is not collusive is sufficiently shown by the "length and character of the litigation. I further offer and stand "ready to make such other or further or different stipulation by "amendment of the pleadings or otherwise, as may, in the opinion "of your honor, be required to make it unnecessary for the court to "hear and decide upon the issues and evidence in this case after a "long and expensive hearing.

"To this end I declare my willingness to stipulate and I do hereby "stipulate that the plaintiff, at the time of the commencement of "this suit, was living and ever since has been living separate and "apart from her husband without her fault, and may take a decree "with my consent for such sum as may be reasonable and just for "her separate maintenance.

"This is the same offer which I have made by way of an attempt at "compromise ever since the commencement of this suit, in which
"effort a compromise I have not hesitated to offer double the
17 "amount that, in my opinion, should be allowed for her sepa-
"rate maintenance by the court.

"(Signed) GEO. F. HARDING, *Pro Se.*

"WM. J. AMMEN,
"*Solicitor for D'f't.*"

That in and by said statement in writing and by so presenting, and reading, and filing the same, the said George F. Harding, as defendant in said suit in said circuit court of Cook county, did solemnly admit of record therein that this defendant, Adelaide M. Harding, at the time of the commencement of said suit in the said circuit court of Cook county, to-wit, on the 3rd day of February, 1890, was living, and ever since had been living separate and apart from her husband, the said George F. Harding, without her fault.

That the said living by this defendant, Adelaide M. Harding, separate and apart from her husband, the said George F. Harding, which is in the said statement of the said George F. Harding mentioned, as aforesaid, (and which is thereby admitted to be without her fault), was and is the same identical living separate and apart from the said George F. Harding which is referred to in the said complaint of the said George F. Harding against this defendant herein, and not otherwise; and that the separation and leaving by this defendant of said George F. Harding, which is in the said bill of complaint of this defendant as complainant in the said
18 circuit court of Cook county alleged, as above mentioned, and the living thereafter separate and apart which the said George F. Harding in and by the said statement admits of record, was without her fault, as aforesaid, is the same separation and leaving of him by this defendant, and the same living separate and apart from him which is mentioned and referred to by the said George F. Harding in his said complaint herein, and as to which he in his said complaint herein falsely alleges, was a desertion and abandoning of him, and a continuing wilfully and without just cause to desert and abandon him and to live separate and apart from him without just cause or reason and against his will and without his consent.

That this defendant herein pleads the said statement and solemn admission of record of the said George F. Harding in the said circuit court of Cook county, as a bar herein to his said complaint in this superior court of San Diego county, aforesaid.

Fifth. That afterwards, on the 17th day of January, 1893, such further proceedings were had in said cause in said circuit court of Cook county, that this defendant filed therein her certain counter-statement in writing, as follows:

19 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County. In Chancery.

ADELAIDE M. HARDING }
vs.
GEORGE F. HARDING. }

Counter-statement of Adelaide M. Harding, Complainant.

"Adelaide M. Harding, complainant in the above entitled cause, "declares and stipulates as follows:

"That as to the document or voluntary stipulation signed by the "defendant, George F. Harding, filed in said cause on Janury 3rd, "1893, the same was submitted to the court and made and filed "without any knowledge on her part; that she is, and always has "been, confident of the justnesss of her cause, and of maintaining "the same in court, and that the evidence heretofore taken in "said cause and the advice of her counsel, give her great certainty "of maintaining her cause; that she is desirous of avoiding scan-"dal and expense, and in the interests of the family and of peace, to "put an end to this litigation, and that on this account she has, "through her counsel, been endeavoring to arrive at a compromise "settlement of the question of the amount to which she is
20 "entitled herein, and has been willing at all times to make "such a settlement of the said question of amount upon a "basis which, so far as the matters in said written admission or vol-"untary stipulation on file in said cause are concerned, was on the "basis of the same, viz.: the admission by the defendant and a "finding and decree of this court thereon, that she was at the "time of the filing of the bill herein, living separate and apart "from the defendant without fault on her part, and has been so liv-"ing ever since except as to the amount of the allowance, and that "as to the amount of the allowance and the terms of payment, the "parties heretofore arrived at a substantial agreement in such at-"tempts to compromise. The points of variance on which said set-"tlement was impossible, were the fact that the defendant was not "willing to admit the fact that the complainant herein, at the "time of bringing the suit, was living, and since that time has "been living separate and apart from defendant, without fault on "her part; or, that any decree finding the same or fixing the "amount of the allowance of alimony should be made; or that any "decree should be entered in this cause upon which a settlement "of this cause could be made, except an order of court approving "such contract as the parties might make, and dismissing the bill "of complaint herein, and the basis of the settlement required by "defendant further involved the release by the complainant,

"of all causes of action against the defendant, not only
"for past misconduct as the husband of complainant, but
21 "also for or on account of any future misconduct of defendant
"as the husband of complainant, and also involving such
"form of agreement as should not operate as a bar in favor of com-
"plainant as against any suit which might be brought by defend-
"ant against the complainant for a divorce for alleged desertion,
"with which defendant wrongfully charges complainant in his an-
"swer herein.

"That the parties hereto in such negotiation for a compromise,
"reached an agreement as to the amount of the allowance of ali-
"mony or payments for complainant's support, and for the support
"of Susan Grace Harding and Rebecca Madeline Harding, minor
"daughters of said parties, residing with the complainant, which
"defendant should make to complainant, and said Susan Grace
"and Rebecca Madeline Harding, and the amount of allowance
"which said defendant offered to pay upon such compromise, is as
"follows:

"The sum of six thousand dollars per annum for the support and
"maintenance of the complainant, Adelaide M. Harding, during
"her natural life, commencing with the first day of June, 1892,
"payable in advance in quarterly instalments of fifteen hundred
"dollars each, and the further sum of one thousand dollars per
"annum for the support and education of Susan Grace Harding,
"the daughter of said parties, from the first day of June, 1892, until
"and including her twenty-first birthday, and the like sum
22 "of one thousand dollars per annum for the support and
"education of Rebecca Madeline Harding, commencing with
"said first day of June, 1892, to and including her twenty-first birth-
"day, and as to the payments to be made to Susan Grace Harding
"and Rebecca Madeline Harding, respectively, after they reach
"the age of eighteen years, and until they reach the age of
"twenty-one years, such payments shall be deposited in such
"bank as they may elect, to their credit, respectively, or to the
"credit of such agent as they may each, respectively, designate
"by writing; provided, however, that in the event of the death of
"said Susan Grace Harding or Rebecca Madeline Harding, the pay-
"ments to the daughter so dying or to her mother on her account,
"shall thereupon cease; the intention thereof being to pay at the
"rate of one thousand dollars per year for the support of said Susan
"Grace Harding and Rebecca Madeline Harding, each respectively,
"from the date of the first day of June, 1892, to and including the
"date of the twenty-first birthday of each of said daughters respect-
"ively, and to make the payments at the rate of one thousand dol-
"lars per annum for each of said children for the portion of the year
"intervening between the first day of June, 1892, and the date of
"the next birthday thereafter, of each of said daughters. All these
"payments to or for the said daughters shall cease and end at the
"death of the defendant, George F. Harding, in case he shall die

"before the said daughters, or either of them, arrive at the
23 "age of twenty-one years. And the further sum of two
"thousand three hundred fifty dollars to be paid to the
"complainant in cash upon the signing of said contract; and said
"defendant, George F. Harding further agreed in consideration of
"the premises, that at the time of the execution and delivery of
"said contract of settlement, to execute, acknowledge and deliver a
"warranty deed conveying in fee simple to Susan Grace Harding
"and Rebecca Madeline Harding, but subject to a trust deed now
"thereon securing a note of five thousand dollars and interest which
"the grantees here assume and agree to pay, the real estate sit-
"uated in the city of Chicago, Cook county, Illinois, described as
"follows:

"Lot twenty-three (23) and the north nine (9) feet of lot twenty-
"four (24), in Groves & Waldo's re-sub-division of part of Grove's
"subdivision of part of the south half (½) of the north half (½) of the
"north east quarter (¼) east of Cottage Grove avenue, of section (34),
"township thirty-nine (39) north range fourteen (14) east of the
"third principal meridian, and subject also to a certain lease thereon,
"expiring April 30th, 1893, which lease and the right of rent
"thereunder accruing until the expiration thereof, said defendant,
"George F. Harding, reserved to himself.

"And as security for the payment of the moneys provided for in
"said proposed contract of settlement to be paid by the said
24 "George F. Harding to said Adelaide M. Harding, Susan
"Grace Harding and Rebecca Madeline Harding, said
"George F. Harding agreed to execute, acknowledge and deliver
"a deed of trust to such person or persons as the said Adelaide *H.*
"Harding shows as trustee or trustees, conveying all the farm lands
"owned by him in the counties of Warren, Mercer and Henderson,
"in the State of Illinois, for the purpose of said security, in fee
"simple, subject, however, and subject only to the mortgage or trust
"deed now pending or in force on parts of said lands, securing
"the indebtedness of said George F. Harding, amounting to the
"sum of eighty-five thousand dollars, due to the Firemen's Insur-
"ance Company of Chicago, which mortgages are recorded in the
"recorder's office of said counties, respectively, which indebtedness
"the said George F. Harding agreed to pay, and to forever save the
"said Adelaide M. Harding and her said security thereunder pro-
"vided for, wholly harmless therefrom and unaffected thereby, and
"further guaranteeing the final payment and discharge thereof, and
"also the prompt payment of the sums of money provided to be
"paid to the said Adelaide M. Harding and the said daughters
"according to the tenor and effect of said contract, and that said
"deed of trust should be a security for each of said payments, the
"same as if a separate trust deed were made charging and
"applying as a separate trust for each of said payments.

25 "That while the times of payments were provided for in
"drafts of agreement assented to in that respect by the defend-

" ant, or prepared by him at later interviews, the said terms for pay-
" ment were modified by him so as to require further time for said
" payments during 1893, by an extension of four months on each
" payment payable in 1893; that the matter of the settlement of said
" extension had not been completed at the filing of said voluntary
" stipulation by the defendant; that these sums so assented to and
" proposed by him, were also assented to by complainant, and the
" arrangement of the extension of the times of making such payments
" was not made a vital point in said attempted settlements, although
" not entirely adjusted, but the failure to arrive at an entire com-
" promise was because the defendant not only was unwilling to ad-
" mit the fact that complainant was at the time of the filing of the
" bill in this suit and thence hitherto living separate and apart from
" defendant without her fault, or, that a decree, except a decree ap-
" proving such agreement as might be made and dismissing the suit
" might be entered in the cause, but also because defendant insisted
" during the first attempts at negotiation, that there should be a de-
" cree in this cause in his favor upon the issues herein, and that at
" the end of the negotiations when it was supposed that the parties
" had arrived substantially at terms of settlement in other respects,
" he insisted that nothing in the agreement that might be made, or
" in the disposition of this cause, should be a bar to his bring-
26 " ing suit for divorce, based upon the alleged cause of deser-
" tion by complainant, when, on account of defendant's mis-
" conduct, complainant without fault on her part, separated from
" defendant and brought this suit.

" The voluntary stipulation by defendant filed herein, removes
" the principal elements of difference on account of which the at-
" tempted settlement between the parties to this cause failed. Al-
" though complainant insists and always has insisted that the amount
" offered by defendant is less than one-half of what defendant is able
" to pay, and what is necessary and suitable to the condition in life
" of the parties, and what the defendant should be decreed to pay,
" still complainant says that for the sake of now promptly securing
" family peace, which has been disturbed by the litigation made
" necessary by the course of defendant, and now promptly securing
" an end of this litigation, and for the sake of prompt payment of
" said amounts so offered at the times provided therefor, without
" further litigation thereon, she is willing, upon a decree, finding
" that complainant was living separate and apart from defendant
" without fault on her part, being now promptly entered such as the
" said voluntary stipulation of defendant justifies to have the amount
" of her allowance now promptly fixed by decree at the amount
" which the defendant has offered as aforesaid.

" Inasmuch as the amounts of the payments to the two
27 " daughters which were included in the terms of said pro-
" posed settlement offered by defendant, could only be pro-
" vided for herein by decree allowing the same to complainant, the
" allowance to the complainant in the decree should be eight thou-

"sand dollars per annum, to and including the twenty-first year of "the elder of said daughters; then seven thousand dollars per "annum to and including the twenty-first year of the younger of "said daughters, and thereafter six thousand dollars, as provided in "said proposed settlement offered by defendant.

"That if defendant had in such negotiation as has heretofore oc- "curred, admitted the fact that complainant was living separate and "apart from him without fault on her part, as is done in such vol- "untary stipulation, and offered that complainant might have a de- "cree in this cause on that basis, this case would long ago have "been settled and disposed of.

"(Signed) ADELAIDE M. HARDING."

Sixth. That afterwards, in the said circuit court of Cook county, in the said cause hereinbefore mentioned, and while the said cause therein was still pending, and while the said statement and admission of record of said George F. Harding so remained of record therein, the parties to said suit in said circuit court of Cook county, being then and there present by their counsel, and the said George F. Harding being also then and there present in person, the
28 said circuit court of Cook county, by the consideration of said court, entered its certain order in said suit therein upon the said statement and admission of the said George F. Harding, wh-ch order was as follows:

ADELAIDE M. HARDING
vs.
GEORGE F. HARDING.

"This cause coming on to be heard upon the motion to set the "said cause down for hearing, and to hear the same, it is ordered "that this cause be, and the same is, referred to Horatio L. Wait, one "of the masters in chancery of this court, to take evidence and re- "port the same with his conclusions herein, upon the issue in ques- "tion as to the amount or amounts, if any, to be allowed complain- "ant, and to be decreed to be paid by defendant to complainant for "alimony, support or otherwise herein, and upon other issues herein "than the question as to whether complainant at the time of the "commencement of this suit was, and since that time, has been and "is living separate and apart from her husband, the defendant, "without her fault, said defendant having admitted upon the "record herein, and now admitting in open court, that the com- "plainant was at the time of the commencement of this suit, and "since that time has been and is living separate and apart from her "said husband without her fault.

"And it is further ordered that upon said hearing, all
29 "competent evidence heretofore taken in this cause may be "read upon said hearing before the master, and other com- "petent evidence may be introduced by either party, and that the

"said master submit his report herein within fourteen days from "and after this date; and that the respective parties have such por- "tions of time, respectively, within said time so limited, for the in- "troduction of evidence and argument, as the said master shall "prescribe."

That afterwards, on or about the 15th day of April, A. D. 1896, such further proceedings were had in said last mentioned suit in said circuit court of Cook county, that the said order last mentioned was amended by substituting in place of the words in said order "and now admitting in open court," the words, "as by his written stipulation filed here on Jan'y 3rd, 1893, and for the purpose of this trial only."

That such further proceedings were had in said suit in the circuit court of Cook county that on the 22nd day of September, A. D. 1896, said Horatio L. Wait, master in chancery of said last mentioned court, to whom said cause was referred by said last mentioned order, in pursuance of said order of reference, filed in said circuit court of Cook county his report, in and by which said report, he did report the evidence taken by him under said order, and his conclusions therein, and by such report, among other things, the said master found, concluded and reported, that said complainant in said last mentioned suit the said Adelaide
30 M. Harding was entitled to the sum of $8,000 per year for her support, and a separate maintenance, to be paid by said George F. Harding, and was entitled and should be allowed certain other sums therein mentioned for the support of the children of said parties therein mentioned; to be paid by said George F. Harding; and said report having been excepted to by this defendant as complainant, and by said George F. Harding as defendant, such further proceedings were had in said circuit court of Cook county in said suit therein, that afterwards said suit came on to be heard in said last mentioned court, as in the decree hereinafter mentioned, and the said parties having been heard therein, and the said circuit court of Cook county having taken said cause under advisement, and having duly considered said case, did enter its final decree in the said suit last mentioned on July 26th, 1897, which decree was as follows:

ADELAIDE M. HARDING
vs.
GEORGE F. HARDING.
} Gen. No. 70020. Term No. 77.

"This cause having heretofore at the September and October "terms, 1896, of this court come on to be heard, upon the bill of "complaint as amended herein, the answer as amended of the de- "fendant thereto, the replication of the complainant to such answer, "and the petitions and application of complainant for the
31 "custody of children, and upon the report of Horatio L. Wait, "master of chancery of this court filed herein on the 22nd

" day of September, 1896, under and in pursuance of the order of " reference to him theretofore entered herein, and upon the evidence " referred to in the report of said master and upon which the said " hearing before him on said reference was had, and upon the ex- " ceptions thereto on the part of the complainant filed September 22, " 1896, and upon the exceptions thereto on the part of defendant " filed September 22, 1896; and the court having at the close of the " said hearing taken said cause under advisement; and this cause " also having come on to be heard at the January term, 1897, of " this court, (said cause being under advisement as aforesaid,) upon " the petition and application of the complainant for an allowance " of solicitor's fees to the complainant and against the defendant " herein, and for the allowance to the complainant and against the " defendant for expenses of prosecuting her suit, and upon the peti- " tion of the defendant theretofore on January 22nd, 1897, filed " herein, and the complainant's answer thereto filed February 4th, " 1897, and upon the proofs and evidence taken and heard in open " court upon said hearing last mentioned; and the court having " heard the arguments of counsel and having thereupon taken the " said cause under advisement:

" And the court having now considered and being duly
32 " advised in the premises, doth find that the said complain-
" ant, at the time of the commencement of this suit, was liv- " ing and ever since that time has lived and is now living separate " and apart from her husband, the said defendant, without her fault; " and that the equities of this cause are with the complainant.

" And the court doth further find and adjudge that the findings " and conclusions of the said master in chancery, Horatio L. Wait, " in his said report contained, are correct, and that the exceptions " of each of the parties thereto are not well taken, and that such ex- " ceptions and each of them be and the same are overruled. But " the court doth further find that since the taking of the proofs and " evidence before said master was concluded, and since the said " hearing upon the exceptions to the said report of the said master " at the September and October terms of this court, a change has so " taken place in the value of property and the circumstances of the " defendant, in that the rental value of the property of the defend- " ant has been *temporarily* depressed and reduced and the amount of " the defendant's income therefrom temporarily reduced in the opin- " ion of the court, that the allowance fixed by the master should be " reduced to the amounts hereinafter specified; it is therefore ordered, " adjudged and decreed by the court that the complainant is entitled " to an allowance from defendant for her reasonable support and " maintenance while they, the said complainant and the said defend-
" ant, have so lived separate and apart, and while they do
33 " so live separate and apart; and that, having reference to
" the condition of the parties in life, and the circumstances of " this case, the said complainant be allowed and that the defendant " do pay to the complainant, the sum of six thousand four hundred

"dollars ($6,400) per year from the date of the entry of this decree,
"(this decree being without prejudice to such order of July 1st, A. D.
"1890, as to the amount so unpaid thereunder), and that the defend-
"ant do pay to the complainant as and for such allowance for her
"separate maintenance hereby made accruing from and after the
"entry of this decree, the said sum of six thousand four hundred
"dollars ($6,400) a year, from and after the date of the entry of this
"decree until the further order of the court, and that the said sum
"of six thousand four hundred dollars ($6,400) from and after the
"entry of this decree, be paid in monthly installments of five hun-
"dred thirty-three and one-third dollars ($533⅓) per month, pay-
"able in advance on the 26th day of each and every month com-
"mencing on the 26th day of July, 1897, until the further order of
"this court.

"And the court doth further find that the said complainant has
"supported the daughters of the complainant and defendant, Susan
"Grace Harding and Madeline Harding, from the date of the filing
"of the bill of complaint herein until the said daughters, respect-
"ively, arrived at the age of eighteen years; that the said
34 "Susan Grace Harding became eighteen years of age on the
"10th day of December, 1892, and the said Madeline Harding
'became 18 years of age on the 18th day of November, 1896; and
"the court doth find, order and adjudge and decree that the com-
"plainant have and she is hereby awarded the custody of the said
"daughters from the date of the filing of the bill of complaint
"herein; and that the defendant do pay to the complainant, within
"twenty days from the date of the entry of this decree the sum of
"two hundred dollars ($200) per month, for each and every month,
"from the date of the filing of the bill of complaint herein until the
"12th day of December, 1892, as and for the maintenance of the said
"two daughters until said last mentioned dates, and the sum of one
"hundred dollars ($100) per month from the said 12th day of De-
"cember, 1892, until the 18th day of November, 1896, as and for
"the support and maintenance of the said Madeline Harding be-
"tween said two dates last mentioned, the said sums amounting in
"the aggregate to the sum of eight thousand one hundred and fifty-
"six dollars and sixty-one cents ($8,156.61).

"And it is further ordered, adjudged and decreed that the de-
"fendant do also pay to the complainant or her solicitors, John S.
"Miller and Merritt Starr, as solicitor's fees herein of the said solicit-
"ors last mentioned, the sum of eight thousand dollars ($8,000)
"within twenty days from this date.

"And the court doth further order, adjudge and decree
35 "that the defendant do also pay to the complainant within
"twenty days from the date of the entry of this decree
"the further sum of nine hundred ninety-six dollars and forty-seven
"cents ($996.47), which she has paid or incurred to enable her to
"prosecute this suit in excess of the sum heretofore allowed to her
"therefor, and which is allowed to her for that purpose.

"And it is further ordered that the defendant do pay the costs of "this suit to be herein taxed.

"And it is further ordered, adjudged and decreed that this decree "be made a lien on the real estate of the defendant; and in case of "default in the payment of the said installments of money as the "same become due, or costs herein, that execution issue thereon. "And it is ordered that either party be at liberty to apply to the "court as circumstances may require.

"And it is further ordered and decreed that the petition and mo- "tion of defendant to reduce or modify, or suspend or release, or dis- "charge the defendant from payment of the allowance made for "temporary alimony by the decretal order entered herein on the "first day of July, 1890, or to modify or affect said order last men- "tioned be and the same is denied; and that this decree is without
"prejudice to the said decretal order of July 1, 1890, as to the
36 "amounts of money which have accrued or become payable
"to the complainant thereunder at the time of the entry of "this decree.

"And the said defendant objects and excepts to the foregoing de- "cree, and to every finding and every portion thereof, severally, and "prays an appeal therefrom to the appellate court in and for the "first district of Illinois, which appeal is hereby allowed, and twenty "days are hereby given said defendant in which to file an appeal "bond in the sum of $5,000.00 with security to be approved by the "clerk of this court.

"And by agreement of the parties to this cause said defendant "and complainant are each hereby allowed sixty days from this "date within which to present a certificate of evidence as to the evi- "dence and proceedings of, in, during or subsequent to the January "term, 1897, of this court in said cause."

That the said George F. Harding never did, in any way, withdraw or retract the said statement and admission of record in the said suit in the said circuit court of Cook county, which is above mentioned; and that said proceedings and decree in said circuit court of Cook county in said suit from and after the filing of said statement and admission of record, on the 3rd day of January, 1893, proceeded upon the said statement and admission of record of said George F. Harding. And so this defendant says that the said decree of the said city court of Cook county and
said court last mentioned in entering the said decree.
37 proceeded upon the statement and admission of record of the said George F. Harding, in finding and adjudging in said decree that this defendant was, at the time of the commencement of said suit in said circuit court of Cook county, to-wit, on the 3rd day of February, 1890, and ever since had been, and then still was, living separate and apart from the said George F. Harding, without her fault; and that said decree was, in and with respect to said finding and judgment in the said final decree of said circuit court of Cook county (that this defendant as complainant, at the

time of the commencement of said suit in said circuit court of Cook county was living, and ever since that time had been living, and at the time of the entry of said final decree was living, separate and apart from her husband, George F. Harding, without her fault), free of error and unimpeachable and irreversible at the suit or on the contention of said George F. Harding.

And so this defendant sets up and pleads the said orders and decree of the said circuit court of Cook county in the said suit therein, and the solemn admission of record of said George F. Harding therein, as aforesaid, in bar of this suit.

Wherefore the defendant demands judgment in her favor, etc.

ADELAIDE M. HARDING, *Defendant.*
WORKS & WORKS, *Her Attorneys.*

38 Duly verified.

Endorsed: Received copy of the within this 1st day of October, 1900. Puterbaugh & Puterbaugh, attorneys for plaintiff. Filed Oct. 1, 1900. Will H. Holcomb, clerk.

Title of Court and Cause.

The Supplemental Answer of Defendant, Adelaide M. Harding, to the Bill of Complaint of the said Plaintiff, George F. Harding.

First. Defendant adopts her answer heretofore filed herein; and supplements the same with the following, and by way of supplement thereto, states:

Second. That such further proceedings were had in the said suit in the circuit court of Cook county, in the State of Illinois, which is in her said original answer herein mentioned and referred to, after the entry of the said final decree of July 26, 1897, which in said answer mentioned and referred to, that said George F. Harding prayed and prosecuted his appeal from said decree to the appellate court for the first district of Illinois, to the October term of
39 said last named court, which convened next after the entry of said decree, to-wit, on the first Tuesday of October, 1897; and that such further proceedings were had in said last mentioned court that by the judgment and consideration of said court afterwards, to-wit, on the ninth day of January, 1899, one of the days of the said October term of said last mentioned court, the said final decree of the circuit court of Cook county was affirmed; reference to which judgment and order of affirmance of said appellate court, or to a copy thereof ready to be produced, is hereby made for greater certainty.

Third. That thereupon afterwards such further proceedings were had in said last mentioned suit that the said George F. Harding prayed and was allowed and prosecuted an appeal from the said

judgment of affirmance entered in the said appellate court to the supreme court of Illinois, to the April term of said last mentioned court thereafterwards convened, to-wit, on the first Tuesday of April, A. D. 1899; and that such further proceedings were had in the said supreme court, in said last mentioned cause, that said cause was submitted to said last mentioned court upon the briefs and arguments of counsel for the respective parties at said April term of said court, and was taken under advisement by the said supreme court and continued under advisement until the seventeenth day of June, A. D. 1899, one of the days of the June term of said
40 supreme court; and thereupon on said 17th day of June, 1899, such further proceedings were had in said supreme court that by the consideration and judgment of said last named court the said final decree of the circuit court of Cook county was modified by reducing the amount to be paid to this defendant, Adelaide M. Harding, from the sum of sixty-four hundred dollars ($6,400) per annum, directed to be paid to her by the said final decree of the said circuit court, to the sum of thirty-six hundred dollars ($3,600) per annum; to be paid in monthly installments of three hundred dollars ($300), and that the decree to be rendered in pursuance of the judgment and order of the supreme court should provide that such alteration in the allowance for alimony might be made by future decree or decrees as should or might be found to be just and reasonable; and that the decree of the circuit court and the judgment of the appellate court in said cause were affirmed by the said judment and order of the supreme court so modified and ordered to be modified, and in that respect they were reversed; and by the judgment and order of the said supreme court in said cause the said cause was remanded to the circuit court of Cook county with directions to enter a decree in conformity with the opinion and judgment of the said supreme court; and that the opinion of the said supreme court upon the said appeal in said cause is reported in volume 180 of the Illinois Reports, at
41 pages 481 to 524, and reference to a copy of the opinion of said supreme court is hereby made for greater certainty.

Fourth. That such further proceedings were had in said supreme court that the said George F. Harding filed in the said supreme court his petition for a rehearing of the said cause, which petition for rehearing was afterwards, by the consideration and judgment of the said supreme court, on October fifth, 1899, one of the days of the October term, A. D. 1899, of the said supreme court, denied.

Fifth. That afterwards such further proceedings were had in the said suit that the mandate of the said supreme court of Illinois in said cause last mentioned, in accordance and in pursuance of the said opinion and judgment of the said supreme court upon said appeal, was duly filed in the said circuit court of Cook county; and in the said circuit court of Cook county such proceedings were thereupon afterwards had upon the said mandate that the decree of the said circuit court of Cook county in the said suit last mentioned was

entered in accordance with the said mandate, to-wit, on December 8, 1899, and which last mentioned decree is as follows:

"December 8th, A. D. 1899, November Term.

ADELAIDE M. HARDING
vs.
GEORGE F. HARDING. } Bill 79,020.

42 "This day come again the parties hereto by their solicitors, "respectively; and this cause coming on to be heard on the "final order of the supreme court of Illinois, in said cause, entered "on the seventeenth day of June, A. D. 1899, a duly certified copy "of which was, pursuant to the statute in such case made and pro- "vided, duly filed herein in the office of the clerk of this court on "the fifteenth day of November, A. D. 1899;—and upon the motion "of complainant herein by her solicitors here now made in open "court on due notice to the defendant, that the court here now en- "ter its decree modifying the decree heretofore entered herein, on "the twenty-sixth day of July, A. D. 1897 in conformity with the "said order of said supreme court of Illinois; and this court having "heard said motion and having inspected said duly certified copy "of the order of said supreme court of Illinois, and having heard "arguments of counsel and being advised in the premises, doth here "now order, adjudge and decree that in conformity with said order "and mandate of said supreme court said final decree heretofore "entered herein on the twenty-sixth day of July, A. D. 1897, be, "and the same is hereby modified by reducing the amount pro- "vided by said decree of July 26, 1897, to be paid thereunder by "the defendant to the complainant from the sum of six thousand "four hundred dollars ($6,400) per year in said decree of July 26 "1897, mentioned, to the sum of three thousand six hundred dollars

43 "($3,600) per annum, to be paid in monthly installments "of three hundred dollars each; and that for that purpose "the words 'three thousand six hundred dollars ($3,600)' "be and the same are substituted in the said decree of July 26, 1897, "in lieu and stead of the words 'six thousand four hundred dollars "($6,400)' where the same occur, and that the words 'three hundred "dollars ($300)' be and the same are substituted in the said decree "of July 26, 1897, in lieu and stead of the words 'five hundred and "thirty-three and one-third dollars ($533⅓)' where the same occur.

"And the court doth further order, adjudge and decree that such "alteration of this decree in the allowance of alimony may be made "by future decree or decrees as shall or may be found to be just and "reasonable.

"And the court here now further orders, adjudges and decrees "that said decree of this court entered on said July 26th, 1897, so "far as not inconsistent herewith, and that said decree of July 26,

"1897, as so modified, stands in full force; and that the same be "obeyed by the parties hereto.

"And it is further ordered that the petition heretofore filed by 'complainant for additional allowances, being for solicitors' fees, etc., "since the entry of said decree of July 26, 1897, be reserved and be

"and is set down for hearing on the 3rd day of January, 1900,

44 "at ten o'clock, a. m. and said defendant is ruled to answer "said petition within ten days from this date."

(Entered of record at page 262 of Chancery Record No. 327 of the circuit court of Cook county, Illinois, December 8, A. D. 1899.)

That said last mentioned decree and the said final decree of July 26, A. D. 1897, in said original answer referred to, as so modified by the said decree of December 8, 1899, still stands in full force in all respects; unmodified and unreversed.

Sixth. That the said George F. Harding has acquiesced in the said decree last mentioned, by paying to the said Adelaide M. Harding and has paid to the said Adelaide M. Harding large sums of money in pursuance of and as directed by the said decree last mentioned.

And this defendant pleads and sets up the said suit in the circuit court of Cook county and the said final decree therein as so modified and entered, as a bar to and estoppel of the said suit and supposed cause of action set up by the said plaintiff herein.

WORKS & WORKS,
Attorneys for Defendant.

(Duly verified.)

Endorsed: Received copy of the within this 4th day of January, 1901. Puterbaugh & Puterbaugh, attorneys for plaintiff.

45 Filed Jan. 4, 1901. Will H. Holcomb, clerk. By Walter M. Edwards, deputy.

Title of Court and Cause.

Findings of Fact and Conclusions of Law.

This cause came on regularly for trial on the 14th day of January, 1901, and Messrs. Puterbaugh & Puterbaugh appearing as attorneys for the plaintiff and Messrs. Works & Works appearing as attorneys for the defendant, and the cause being submitted upon the complaint and upon the answer and supplemental answer of the defendant, filed herein; and from the evidence introduced by the respective parties herein and the court being fully advised in the premises, finds the facts as follows:

I.

That the plaintiff and defendant were married in the month of November, 1855, at the city of Peoria, county of Peoria, State of

Illinois, and cohabited as husband and wife until about the first day of February, 1890.

II.

That the plaintiff is a *bona fide* resident of the county of San Diego, State of California, and has been since the 15th day of
46 May, 1895; and that said plaintiff has been a resident of this State for more than one year and of said county for more than three months immediately preceding the commencement of this action and the filing of the complaint herein.

III.

That on or about the first day of February, 1890, the defendant, disregarding the solemnity of her marriage vow, did, willfully and without just cause, desert and abandon the plaintiff, and ever since then has and so continues to willfully and without just cause, desert and abandon the plaintiff and to live separate and apart from him, without any sufficient cause or reason, and against his will and without his consent.

IV.

The court further finds that all the allegations in the complaint herein are true and that all the allegations, averments and denials in conflict with the allegations in said complaint, contained in the answer and supplemental answer of the detendant, herein, are untrue.

V.

The court further finds that there is no community property or homestead in this State; that the circuit court of Cook county, Illinois, a court of competent jurisdiction, in a proceeding for separate maintenance by the defendant against the plaintiff, has entered de-
crees for allowances of alimony in favor of the defendant and
47 against the plaintiff, which are allowances, adjudged by the supreme court of Illinois to be equal to the present ability of the estate of the husband, with the right reserved to the wife to increase the same when the faculties of the husband may be decreed to warrant an increase of such allowance.

As conclusions of law from the foregoing facts the court finds:

I.

That the plaintiff is entitled to a decree of this court dissolving the bonds of matrimony heretofore existing between the plaintiff and defendant herein, decreeing the plaintiff and defendant each to be freed and absolutely released from the bonds of matrimony and all obligations thereof.

II.

That this court in this case has no jurisdiction to limit or in any way effect the decree of the circuit court of Cook county, State of Illinois adjudging a separate maintenance to the defendant.

N. H. CONKLIN.

Dated, January 31st, 1901.

Endorsed: Filed Feb. 1st, 1901. Will H. Holcomb, clerk.

48 Title of Court and Cause.

Decree of Divorce.

This cause came on regularly to be heard on the 14th day of January, 1901, upon the complaint of the plaintiff and the answer and supplemental answer of the defendant herein, and the respective parties being represented by counsel, and the court having filed its findings of fact and conclusions of law, from which it appears that all the material allegations of the complaint are sustained by the testimony, free from all legal exceptions, as to its competency, admissibility, and sufficiency, and all and singular the law and premises being by the court here understood and fully considered:

Wherefore, it is here ordered, adjudged, and decreed, and this does order, adjudge, and decree, that the marriage between the said plaintiff, George F. Harding, and the said defendant, Adelaide M. Harding, be dissolved, and the same is hereby dissolved, and the said parties are, and each of them is freed and absolutely released from the bonds of matrimony, and all the obligations thereof.

It is further ordered that the costs of this action be paid by the plaintiff.

Done in open court, this 31st day of January, 1901.

N. H. CONKLIN,
Judge of the Superior Court.

49 Endorsed: Filed Feb. 1st, 1901. Will H. Holcomb, clerk

Title of Court and Cause.

From minutes of court of April 1st, 1901.

Come the parties, the plaintiff by M. L. Ward, Esq., who moves the court that his name be associated as attorney for plaintiff upon the record.

Title of Court and Cause.

Bill of Exceptions.

Be it remembered that on the 16th day of January, 1901, this cause came on regularly for trial before the Hon. N. H. Conklin, judge of department two of said court, when the following proceedings were had therein, to-wit

WILLIAM H. BAILHACHE, a witness on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. PUTERBAUGH:

Q. State your name to the court.

Mr. WORKS: I object to introduction of any evidence in
50 this action upon the ground that the cause of action for divorce, if any there ever was, is barred by the provisions of subdivision 3 of section 124 of the Civil Code.

The COURT: The objection is overruled.

Mr. WORKS: We reserve an exception.

WITNESS: My name is William H. Bailhache. I reside in San Diego. I am about seventy years of age. I have resided here continuously since the summer of 1887. I was formerly a resident of Illinois, all my life pretty much was spent in Illinois. I have seen the plaintiff in the city of San Diego, State of California. In the summer of 1897, he lived with his sister, Mrs. Mary Snyder, at 1845 First street, this city. I saw him frequently during that summer. I had occasion to do so as I was doing business for Mrs. Snyder—getting ready to. I lived in the vicinity. I saw Mr. Harding in San Diego at various times before that date.

Cross-examination.

By Mr. WORKS:

My recollection is that I saw plaintiff in San Diego in the year 1896, and also in 1895. During the year 1897, I saw him here mostly through the summer and part of the fall.

51 Q. What time during the year 1896 did you see Mr. Harding here?

A. My recollection is indistinct; I could not tell.

Q. Can you remember any specific time, either by date or otherwise when you saw Mr. Harding here in 1896?

A. I cannot.

Q. Your are not certain then, are you, you saw him here in 1896?

A. I feel certain of it. I occupied a desk in the office of my son at the corner of Fifth and E streets, Strong, Arms & Company, and

he came there; came in there occasionally to inquire about prices and things and that is why I think so.

Q. Didn't you state just a moment ago you could not state any instance during the year 1896 at which you saw him?

A. I cannot fix the dates.

Q. I asked you if you could fix any such instance by date or otherwise?

A. I cannot. I had the desk room in the place I speak of the best part of the years 1895 and 1896.

Q. I wish you would state to me, if you can, how many times you ever saw the plaintiff in this action, Mr. George F. Harding, in the city of San Diego, prior to the 31st day of August, 1897.

A. Well, I was residing in the block just above Mr. Snyder's house, and he resided there, and I passed there two or three times a day and saw him more or less almost every—I would not say I saw him every day, but I saw him frequently, though I can-

52 not fix the number of times.

Q. Can you state whether or not it was less than a year or more than a year from the time you first saw him in San Diego until the time you last saw him here—I am not speaking about his present visit.

A. Probably two years, as near as I can get at it. I do not know how much of that time he was in San Diego. I think he was away from San Diego a considerable part of those two years. I don't know that as a matter of fact he was away from San Diego a considerable part of two years.

Q. Were there any considerable periods during that two years in which you did not see him in San Diego?

A. Yes. The place where he lived was Mrs. Snyder's residence, I understood it belonged to her, and the way I happened to know about it was that she was getting ready to go away; I was a neighbor and she asked me to look after her property while she was away; that is the way I fix the date. The plaintiff was not keeping an establisment of his own at that time; he was living with his sister.

By the COURT:

I lived in 1897 in the block adjoining that house three years. I lived at 1914 First street, about three years.

GEORGE F. HARDING, a witness on his own behalf testified as follows:

53 Direct examination.

By Mr. PUTERBAUGH:

My name is George F. Harding. I am the plaintiff in this case. I am acquainted with the defendant. She is my wife. We were married in Peoria, county of Peoria, State of Illinois, about 1855.

She has ever since been and is now my wife. On the 31st day of August, 1897, I resided in San Diego. I had resided in San Diego since May, 1895. I resided in the county of San Diego State of California, over three months immediately preceding the commencement of this action. I resided in the State of California over one year immediately preceding the commencement of this action. In the city of San Diego I lived at 1845 First street with my sister, who lived here fifteen years. Her name was Mary R. Snyder. She is my only sister. I rented the house of her under an agreement that she should live in it if she could, and take care of the house for me, being without a wife in fact, that is in—here; desiring to live here on account of my health I took a lease for it and paid her the rent for it from time to time, later negotiated for the purchase of the house and did purchase it; afterwards brought this suit August 31st, 1897.

Cross-examination.

By Mr. WORKS:

I was here in 1894, before I came here to reside, but made my arrangements and leased the property in 1895, on May
54 15th, I think, was the exact date. I was here before that, and after examining property, and trying to purchase property, I leased this property from her. I remained in San Diego continuously I should think some months at that time. It would be quite impossible to say how many months, but two or three months; I was here off and on; I crossed the plains during those years three or four times a year to get here. I was temporarily absent on account partly of health and partly this very severe litigation with Mrs. Harding and other litigation that I had that called me elsewhere.

Q. What is the longest time you remained in San Diego at any one stretch from May, 15th, 1895, to August 31st, 1897?

A. Hard for me to tell—say two or three months. Off and on in other parts of California—went to San Francisco, went with my sister to Santa Monica, passing along the coast for her health and mine.

Q. What is the longest period you were within the State continuously between the dates I have mentioned?

A. Well, I was—you define continuously now—I was in the State from time to time during these two years you know; two years and a half, thereabouts.

Q. I ask you how long you staid in the county continuously for any one time?

A. I have replied to it that I think two or three times I staid in the State for periods say of ninety days or therabouts.

55 Q. You are not sure of any greater length of time than that?

A. Well, no; because I was called away and returned and called

away and returned, making my residence here but having temporary calls elsewhere that were very imperative. I was called out of this State half a dozen times at least in that period.

Q. What is the longest period you were away from the State continuously at any one time?

A. I should think a month or two. The case was heard in January and February, 1897, and I was there then, and I think I was there in the fall of 1896 at hearings of this case, chiefly at hearings of the case you have before you; that took me chiefly; other things had some application, not much, otherwise I should have been here continuously.

Q. During the time from May 15th, 1895, to August 31st, 1897, Mr. Harding, I wish you would state to the court what business interests you had in San Diego?

A. I had a lease of the house at 1845 First strset; I had also negotiations for the purchase of several pieces of property here; you do not ask that, no—I wish to follow you—better confine this to the statement of the fact of that lease and my property here—

Q. (Repeated by reporter.)

A. I was not in business at all; I was trying to rest. I am now seventy and I thought it was about time I should retire. I came here to rest, and in regard to my health; yes, sir, came here
56 to rest. I left here after August 31st, 1897, within perhaps a month or two. I cannot exactly state how long I was gone that time, for my sister soon after became a non-resident of San Diego, and when she became a non-resident of San Diego, while I did not change my residence at all—I was gone perhaps sixty or ninety days, I cannot remember, Mr. Works, might as well answer that way; I am doing my best.

Q. You think you were not gone a longer period than sixty or ninety days?

A. I cannot remember, and cannot answer better than that. My recollection is I was back shortly afterwards, and that my sister changed her place of living in San Diego for some reason, and in November, 1897, he went to Denver, Colorado; I think I am not wrong as to the time, but up to the time that she was here I lived with her. Then I returned to San Diego, I think, I do not recall definitely what I did, but that would be my recollection. I answered it the best I could.

Q. How long a time did you remain in San Diego, or in the State of California, after your coming at that time?

A. The period was perhaps short that I was absent, but I was later—I am answering you the best I remember, I cannot remember in detail—I was afterwards a long time in California, out at Santa Monica.

Q. How long a time is it, to your best recollection, you were here that time, the time you came back after your first absence after the filing of this suit?

57 A. Perhaps a month, I cannot recall definitely. After that I think I went up into California with my sister, and went to San Francisco; that is my impression of the date, and thereafter—I was in the State at that time, I should say, several months, perhaps two months, we were a good while at San Francisco; I was some time at Santa Monica. I do not recall where I went then. I have been many places outside of the State of California since that time. I have traveled and been absent in Boston and New York and in Washington and many places; I have had calls, very important pieces of business in all places, and they were what called me there.

Q. I wish you would state, as near as you can, the length of time you were out of the State of California, after you had been here the period of two months you refer to in which you went to San Francisco and met these people you have mentioned?

A. After this suit was brought, you mean?

Q. Yes.

A. I cannot recall the length of time more definitely than I have stated. I cannot recall what I did then; it does not impress me; my sister very soon thereafter left San Diego, I think in November, 1897; that is my impression about it; if she left later I was with her later; if she left then—I cannot remember except that I was called away from California in the year and in 1898 at some periods and then came back again spending the winter in California, somewhere, sure. I was not always spending the winter here,

58 because of the change taking place in my sister's residence, but I never formed a residence anywhere else,—if you call it interpolating—I have always called myself a resident of San Diego, since the 15th of May, 1895, and so registered and written my deeds in that way, and never voted anywhere else.

Q. You have never voted here?

A. No, sir—never was here and voted here at all, but I refused to vote elsewhere and have never resided elsewhere.

Q. How great a proportion of the time or how much of the time since May 15th, 1895, and up to August 31st, 1896, did you spend in the residence at 2536 Indiana avenue, Chicago, at different times?

A. I cannot recall. I do not know; I was there occasionally; I do not know. I do not remember. I have had considerable business interests in Chicago, during all this time, very heavy. This case was pending and required a great deal of time; briefs in the supreme court; briefs in the appellate court, struggles over various questions connected with it. I have often been in Chicago since May 15th, 1895. Very frequently, more after 1897, than earlier, because matters were becoming more—continuously more dangerous for this estate and there has been more to do, more troubles. My business in Chicago being connected somewhat with getting loans elsewhere in Boston and New York. I haven't got through with

the rest that I came to California for yet. I trust to take more of it here.

59 Q. How long has it been since you were here the last time previous to your present visit?

A. Perhaps three months, I do not recall precisely; at the lowest, three or four months; I really cannot tell. I was at Santa Monica a long time and that was during last summer: that is, let me see—I will tell you with some exactness, it recurs to me now; I was in June and July in Santa Monica; I was here in August or September; that answers your question. I have been in Santa Monica more than once. I was at Santa Monica at two or three or four different periods; I have mentioned two now, one was in 1897, with my sister, a long time there, and I think one earlier, but I am not quite confident of that, and then I told you, I fixed the date; you asked me where I was this year; I told you I spent some time in Santa Monica this year, and some time here this year, a few days here and a few weeks there.

Q. What was it originally brought you to Calfornia, Mr. Harding?

A. Health and my only sister residing here fifteen years. I had visited my sister here before. I think once in 1894, once or twice. Never before that. I have never made any attempt to be registered as a voter here. I hold my residence still here, and never made a residence anywhere else. I am stopping at the Hotel Coronado now. I have been over there ever since I came this last time.

Q. Where have you stopped previously to this present visit
60 since your sister went away in the fall of 1897?

A. I have stopped at different hotels when I have been here since that time, the Brewster, and Coronado, whatever they were, I do not think I have stopped with any private party since then, but always with my sister before. I never have had any regular quarters since my sister went away. The house was occupied, and all that.

Q. Have you any business interests here now?

A. If I understand the words business interest—it is a peculiar term—I have not; in short you better ask me, it seems to me, if I had been in business here. I have not, and am not. I would like to add I have been retired from business for some years everywhere, excepting caring for my own property. I am not thinking of going into any new business enterprises now. I think I have got to the point where I ought to quit and hand it over to young men, and I have been at that point some years.

Q. I ask you to examine that newspaper article and state to whom it refers.

A. It cannot refer to me, because I am not a prominent Chicago real estate man.

Q. Do you see any name there that looks like yours?

A. Can't you read as well as I? George F. Harding; this occurs

to me to be a similar name. There are other people besides me of that name in Chicago.

Q. Did you notice a signed proposition at the bottom of that column?

61 A. Yes, I did.

Q. Is that a proposition made by you and signed by you?

A. No, it is a copy of some proposition touching the railways there which I did make. It is not a true copy, but it resembles it. I did make a proposition to the mayor and common council, to help save the streets of the city to the city. That was within—since I returned, after an absence of three or four months, within—well, January, I guess.

Q. I call your attention to the date at the head of this newspaper, January 10th, 1901.

A. I think that is right. That is about the time. That paper is not correct in many particulars, but I did make such a proposition, and I think it refers to me and to me alone, though the description does not fit me—being a prominent Chicago real estate man.

Q. I wish you would examine the portion of the article following these words "The following is the text of Mr. Harding's offer to purchase the lines," and state whether that is, as near as you can remember, a true copy of the proposition.

A. It is not, precisely as I have answered you long ago. I have read it and I have seen it before. It was sent me by somebody; I have seen that from some one—the Chicago American—yes.

Q. Is it true you offered the amount mentioned in that offer?

A. It is true I offered to take the property and make it pay for itself; the property is supposed to be worth fifteen or twenty

62 millions, and a mortgage on it will easily raise a million dollars; in that sense, and in that alone. These properties are street railways of Chicago that are worth many millions, and this was an effort on the part, as the newspaper says, on the part—on my part—to help the city back into the possession of its streets. I do not propose to advance a penny of my own money, nor any money that I—only for the purpose of getting the city into its possession of its streets; I represented a syndicate in that, a number of people.

Mr. WORKS: If the court please I will offer this proposition contained in the newspaper article in evidence, for the purpose of asking the witness what portions of it are incorrect, so we may get it correctly before the court. (Reading). The following is the text of Mr. Harding's offer to purchase the lines:

"To the mayor and common council of Chicago:

"I will give the city of Chicago one million dollars for the lines "of street railways in said city to which the city is entitled under "its contracts with the several street railway companies, the money "to be applied to the payment for said lines on the part of the city "under said contracts and the residue, if any to be paid into the

"city treasury. I will surrender the lines aforesaid to said city at
"any time upon the re-payment to me of the sums which I shall
"have incurred, less what I shall have received, for the use
63 "and occupation of said lines. I reserve the right to bond
"said lines and borrow upon them whatever may be neces-
"sary in the purchase or conduct of said lines, and to accept from
"the city in payment or give it credit for said bonded indebtedness
"whenever it, the city, shall exercise its option and re-take said lines.
"The fare upon said lines shall not exceed four cents a passenger,
"and shall be subject to be changed by the common council and
"fixed at any time at a sum reasonable and just for the carriage of
"passengers and in the interests of the city. If the lines upon ap-
"praisal, shall cost the city more than one million dollars, then I
"will consent to have the sum raised by the issue of bonds upon
"said lines in excess of said purchase price and in any event will
"provide for the payment of the amount of the appraisement to
"the street railway companies. My object is to secure the public
"property to the public; and I will make any modification neces-
"sary of this offer to advance the public interests and enable the
"public to regain control of its property. I will secure this offer
"and its performance by paying to the city one hundred thousand
"dollars and such other and further sums as may be necessary to
"remove or defeat real or captious objections. You will kindly
"note as the spirit, intention and letter of this proposition, that the
"chief objection heretofore urged to the exercise of the city's rights
"to purchase upon appraisal, namely, because the city is impotent
"and cannot increase its debt, is meant to be hereby re-
64 "moved; and the city at any time can enter into possession
"of its streets upon simply paying what it has cost to secure
"them from the present beneficiaries of their bounty, who have
"thereby grown enormously wealthy and have been in receipt of
"money which if in the city's treasury would have removed a bur-
"den off the back of every man in the city and enabled the city to
"hold its place as the most foremost city in the world.

"GEORGE F. HARDING."

Q. Mr. Harding, point out to the court what inaccuracies there are in that offer as I have read it.

A. I am unable to recall the terms of the offer, but find it impossible to state this is the offer. It is certainly wrong in several instances; I do not know to what extent beyond that.

Q. I would like to have you specify from memory, as well as you can, the inaccuracies in the published offer.

A. I do not think I am bound to do that; it is their paper; they must prove their paper their own way.

The COURT: I think it is proper. It refers to your residence there——

The WITNESS: It doesn't touch my residence—I am a citizen of

this city and reside here. but I have great interests in Chicago,
65 and I should like to lift a burden off the back of every inch of property in the city of Chicago. I might make the offer in Timbuctoo, or New York, the same thing; it has no bearing on my residence. I do not purport to reside there. It has no bearing.

The COURT: They think it has.

The WITNESS: I am answering the question. I cannot answer the question and state in what respects the offer differs; I can point out some respects in which it differs, but I do not pretend that that is all the difference. I certainly never proposed to pay any money into the city treasury. That has been added by somebody; there have been sundry other additions. It is a newspaper article; I cannot for my life tell you in what other respects by memory alone that it differs, but I think in one or two others it clearly differs—nor is it the whole of the article at all; it is not the whole of it as made. That is not the whole of the offer.

Q. Did you offer to purchase the street car lines in the city of Chicago?

A. No; I offered no such thing; that don't purport to be—if you want an explanation of it, it is this; the city of Chicago, in 1858, let its lines—let its streets to the street railways with the provision that the city could at any time take the property back by paying the money. Now that has been extended from time to time, and
66 it has been defeated, as to the city, because of its alleged impotency of so doing, and it is without the power, since the city, if it was claimed, had no power to purchase street railways. In order to bridge over that difficulty and prevent that consequence this is an effort to help the city to redeem its lines by using the railways themselves as the basis for borrowing money, not—on the railways, they to be the means of paying for the property. It contained a great deal more than that, it was quite different from that, the real proposition; I did not observe until the moment, that fact.

Q. Is it not a fact that you did offer to give the sum of one million dollars, or some other sum we will say, for these street car lines to which the city is entitled, and offer to hold the street car lines and operate them until the city, or as the city should repay you the amount of money you offered, together with other accruing costs, when you would convey the lines to the city?

A. No, it is not—it is a written offer, a very careful one, with additions to it that change that text entirely; I had forgotten until you showed me the second time—there is a great deal to be added to it.

Q. I wish you would state to the court in a few words the general tenor of the offer you made.

Mr. PUTERBAUGH: Objected to as incompetent, irrelevant and immaterial.

67 The COURT: The objection is sustained.

Mr. WORKS: We except to the ruling.

The WITNESS: I never proposed to operate the lines in the world, or advance any money at all. If the street railways can be made the basis of action a man without a dollar could make the proposition I did. This is not the proposition as it stands, you have got here,—not the one I made.

Re-direct examination.

By Mr. PUTERBAUGH:

My sister, Mrs. Snyder, died within a few days past. She died on the 11th of December, 1900. That is why I haven't her here as a witness.

GEORGE PUTERBAUGH, a witness for plaintiff, testified as follows:

Direct examination.

By Mr. JOHNSON PUTERBAUGH:

My name is George Puterbaugh. I am an attorney-at-law and reside in San Diego. I have lived here about fifteen years, possibly a little longer. I knew the plaintiff previous to my coming
68 to San Diego. I knew him in Illinois. My former residence before coming to San Diego was Peoria, Illinois, and Mr. Harding formerly lived there, but moved over to Chicago, but by reason of my residence there I knew him as a boy, or young man, by general reputation, and from some time prior to 1870 I have known him personally, practising law in Chicago, where I frequently went on professional business. I cannot say when I first saw Mr. Harding in San Diego, but I saw him here some weeks at least prior to the middle of June, 1895; I am inclined to think I saw him in the city of San Diego something over a year prior to that time, but I am not quite positive about that, but I do know I saw him here some weeks prior to the middle of June, 1895. I have seen him here several times since then and conversed with him many times. I knew Mr. Harding's sister, Mrs. Snyder, and had known her for some considerable time prior to June, 1895, but I did not know until some weeks before the middle of June, 1895, that she was a sister of Mr. Harding. I had known the lady here in San Diego, however, before that time.

Q. Did you learn from him at that time he had come here to reside? What was said on that subject?

A. Mrs. Snyder, Mr. Harding and I were some weeks prior to about the middle of June 1895, talking about California in general, and I was very enthusiastic over San Diego, in particular as a resi-
69 dence city, and I said to Mr. Harding, "You ought to come here to live, and rest." His sister spoke up and said, "He is living here," and Mr. Harding said, "Yes, I am living here, and living with my sister," and mentioned the place where they

lived. I knew where Mrs. Snyder lived, and we talked about it in that line, and he expressed himself how he liked it, and hoped when he got over his business worries—so he could remain here and increase his longevity. I had conversation with Mr. Harding in relation to the purchase of property here, at least twice, and have talked over what I thought would be the most desirable places for him to establish his home for his old age, and gave him my reasons for it, and have made investigations about properties, I believe, both occasions for him, and told him the results.

Cross-examination.

By Mr. WORKS:

Q. Why is it you are able to fix with such particularity the time at which you first saw Mr. Harding in San Diego, and why do you fix it at some weeks prior to the middle of June, 1895?

A. In 1895, I was one of the judges of the superior court of this county, and about the middle of June a case was on trial before me in which Mrs. Snyder was a witness, and the moment she came into the courtroom why I thought of her in connection with Mr. Harding, and, I knew that I had never known her as Mr. Harding's sister until I met her with him, and this trial came off about—I
70 thing it was the 12th of June, I may not be exact about the day, but I know it was just before that trial some weeks, that I had this first conversation with him. I saw him a great many times during that visit, a great many times with his sister, and I think with a daughter of his sister; sometimes saw them all three together along about that time before and after the middle of June.

Q. How great a time elapsed between the first time you saw Mr. Harding and the last time you saw him?

A. I am not entirely sure just how long it was that I saw Mr. Harding in San Diego the first time, but I should think it was some time about a year prior to that time that I had seen him; that is the way it impresses me now, about a year prior.

Q. About a year prior to this time, a few weeks before the middle of June, 1895?

A. Yes, my best recollection is about a year before this time that he commenced living here, that I had seen him here.

Q. How long did you see him here after that time a little prior to June, 1895?

A. During that summer I saw Mr. Harding quite frequently. I couldn't say though whether it was ten times or thirty.

Q. What is your best recollection as to the length of time he was in San Diego at that time and you were seeing him?

A. I think, my recollection is he was here quite an ex-
71 tended time; I should think he might have been here any where from two to four months; he might not have been here two months, I think that long, may be considerably longer

than four months for all I know. I met Mr. Harding and talked about old times and old acquaintances frequently.

Q. How long was he gone after he left then—you say you saw him you think anywhere from two to four months and possibly longer?

A. Yes, Mr. Harding has come and gone. I don't know just exactly how long he was away after that. I remember of seeing him again after a time when I didn't see him, in the course of a few months, three or four or five months; I could not make it more definite than that. My recollection is that prior to the time of filing this complaint I saw him here at least twice, or may be more, besides that time, after he left in the summer of 1895. I feel sure I did see him at least twice; I may have seen him oftener. My recollection is I have seen him many more times than twice; I am not able to say he did not go away in the *interim;* if I saw Mr. Harding one week and then not see him for four or five, he might have been away in the *interim.* I saw him more frequently the first time he was here than at any subsequent time. Take the whole summer together I did not see him a great deal more frequently.

Q. How long a time was he here to your own certain knowledge immediately prior to the filing of this complaint?

72 A. He was here and went with Mrs. Levet and her mother to Catalina, and then came back again, and I could not tell you how long a time intervened, but some weeks, or two or three months, something like that.

Q. You state that at one time when you were talking with Mrs. Snyder and Mr. Harding she said that he was in fact living here?

A. Yes; she says, "Why, he is living here now." I think that was about the first expression. That was my first meeting with him with Mrs. Snyder. I had seen Mr. Harding, but not with Mrs. Snyder, and that is the first the question of his living here was spoken to me. He had never mentioned it to me before our conversation.

Q. Did he say in connection with that remark as to how long he had been living here, or how long he intended to remain here, or was it the general expression, "he is living here now"?

A. That he was living here and intended to make it his permanent home; that is the impression I got. I said he ought to come here and live; it was a good place for him to rest, or words to that effect, and she says, "He is living here now." Then she went on and talked, and he spoke up and said he was living here and how he liked it, and we talked about the thing for quite a while—spoke of where they were living and I said—I volunteered my advice where I thought they ought to live.

The following stipulation between the parties was then read to the court:

73 Title of Court and Cause.

"It is stipulated that the printed abstract of the record in the case "of Adelaide M. Harding *vs.* G. F. Harding, circuit court, Cook Co., "Illinois, prepared for appeal by appellant in appellate and supreme "courts, may be used by either party in lieu of the certified copy of "record to save costs. So much of the additional abstract prepared "by appellee as was held to be and allowed as an abstract may also "be used.

"This shall in no wise be a waiver of the right of the defendant "to recover for the cost of the certified copy of record already "named said to be $65,00.

"VICTOR M. HARDING.
"GEO. F. HARDING.

"PUTERBAUGH & PUTERBAUGH,
"*Att'ys for Plaintiff.*
"WORKS & WORKS,
"*Att'ys for Def't.*"

The following stipulation between the parties was then read to the court:—

Title of Court and Cause.

"It is hereby stipulated, by and between the respective parties "hereto, that during the trial hereof, any portion of the testimony of
"the witnesses in the case of Adelaide M. Harding *vs.*
74 "George F. Harding, begun in the circuit court of Cook
"county in the State of Illinois, as such testimony is set forth "in the printed abstract of the record for appeal by the said George. "F. Harding, appellant in said action, in the appellate and supreme "courts of said State, may be read in evidence as fully and with the "same effect as though the witness whose testimony is read were "present in this court.

"This stipulation is intended to obviate the objection that any "witness whose testimony it is desired to introduce is not present in "court, but the testimony of such witnesses, when read, shall be "liable to all other legal objections except as to the form of ques- "tions and answers.

"Either party has the right under this stipulation to introduce "any portion of said printed abstract.

"PUTERBAUGH & PUTERBAUGH,
Attorneys for Plaintiff.
"WORKS & WORKS,
Attorneys for Defendant.

"January 17, 1901."

The COURT: Is the understanding of the terms of the stipulation that it is not to go to the competency of the testimony?

75 Mr. WORKS: Not to go to the competency of the testimony in so far as the witness not being present is concerned.

The COURT: That is the point, exactly.

Mr. WORKS: There are other objections of competency that we might want to urge; I say it is subject to all other legal objections.

The COURT: My understanding is that you waive all objections to the competency of the testimony as introduced here, the manner of its introduction, I mean, not as to its form of substance, but as to the manner of the introduction.

Mr. WORKS: Certainly.

Mr. PUTERBAUGH: I think we want the court especially to agree with us.

The COURT: I understand it that they have stipulated there is to be no objection as to the using of these depositions here because they are depositions taken in another case.

76 Mr. WORKS: That is the point, exactly. We agree to that.

Mr. PUTERBAUGH: Shall we proceed now?

The COURT: You may proceed, sir.

(What here follows is a part of the Illinois record and was introduced under the two stipulations hereinbefore set forth.)

BEATRICE HARDING, a witness in behalf of plaintiff, testified as follows:

Direct examination:

My name is Beatrice Harding; I am nineteen years old; I make my home with my father, the plaintiff in this case, at 2536 Indiana avenue.

Q. Who else are members of the family at that place?

A. My father and my brother, George.

Q. Who other than you three are occupants of the place?

A. And two servants, that is all.

Q. One of them being the cook?

A. Yes, sir; and one second girl.

* * * * * * *

77 Mr. PUTERBAUGH: I offer the deposition of—

G. T. VAN METER, on behalf of the plaintiff, who testified as follows:

78–79 (This is a part of the Illinois record, and was offered under the two stipulations hereinbefore set forth.)

* * * * * * *

80 (Here follows part of Illinois record offered under said stipulations.)

ABNER C. HARDING, a witness on behalf of plaintiff, testified as follows:

* * * * * * *

81 (Here follows part of Illinois record offered under said stipulation.)

AMELIA NEIDERLAND, a witness on behalf of plaintiff, testified as follows:

82 * * * * * * *

Plaintiff then offered in evidence the following portion
83–85 of the record in the Illinois case, under the stipulation:—

GEORGE F. HARDING, JR., a witness for the plaintiff, testified:

* * * * * * *

86–91 Plaintiff offered in evidence the following portion of the record in the Illinois case, under the stipulation:

BEATRICE HARDING, a witness in behalf of plaintiff, testified as follows:

* * * * * * *

92 GEORGE F. HARDING, the plaintiff, recalled in his own behalf, testified:

Direct examination.

By Mr. PUTERBAUGH:

February 1st, 1890, I was living at 2536 Indiana avenue, Chicago, Illinois. I had lived there since 1872. The defendant had lived
with me there during all that time except when she was
93 abroad. The defendant ceased to live with me on February 1st, 1890. I did not know she was going away. She has never returned to live with me since that time. I have requested her to return. On the 5th day of February, 1890, I requested her and she refused to return.

Q. What reason, if any, did she give you for leaving you?

A. None. She said "I have made one mistake, and I will not make another," was her language. That was at the time she was in my house and I requested her to remain, to return. I invited her—she was passing on the street with her two children, having just returned from the country, and I invited her to return to the house and become—and remain there. The children cried. She declined. That was on the 5th of February. When she left I did not know why she left.

Cross-examination.

By Mr. WORKS:

Q. Do I understand you to say, in response to a question by Judge Puterbaugh, that you did not know why your wife left you?

A. Yes. We did not have a conversation on the subject of her proposed leaving before she left, to my recollection. I didn't have a conversation with her in which she gave reasons why she should no longer remain in my house.

Q. Nor why she was dissatisfied with being in your house, or dissatisfied with you?

94 A. How to answer that in a word is difficult. I knew that she had causes as she thought, of complaint, of that sort, but that she intended leaving, or that was the cause of her leaving, I did not know, if that is an answer. She never told me she intended to leave. Never heard of it till she did leave.

Q. Then all you mean by saying you did not know she was going to leave is that she hadn't told you she was going to leave?

A. I mean to say all I have said, which is more than that. I do not think she had good cause to leave on her own statement, but she had causes as she alleged of complaint which were denied by me.

Q. Is it not true that some months prior to her leaving, you did not leave her bed and sleep in another part of the house?

A. No. I always slept in another part of the house, or nearly always. We had different rooms.

Q. When was the last time you occupied the same room before her leaving?

A. October, 1888, or rather she occupied mine.

Q. Not after October, 1888, did you occupy the same bed?

A. She came to my room in October, 1888, and occupied that room with me; that is my recollection. That was the front room in the house.

Q. It had always been your custom prior to that time to occupy the same bed or sleep in different rooms?

95 A. Always different rooms, or nearly always; that is, for some years.

Q. Except occasionally?

A. Yes, the children—one child slept with her.

Q. Then you did not occupy the same bed after October, 1888, up to the time she left?

A. I never occupied the same bed in any other sense than I tell you, and on that occasion. No, we never occupied the same bed again. Not once.

By consent Mr. Puterbaugh here questioned the witness further on direct examination.

By Mr. PUTERBAUGH:

Q. You may look at the letter contained in the abstract of record

of the Illinois case and state whether or not that is the letter you referred to in your direct examination?

A. Yes, sir; I wrote her that letter on February 5th, 1890.

Mr. PUTERBAUGH (reading):

Office of George F. Harding, 170 Madison street, room 51.

CHICAGO, *February 5th*, 1890.

Mrs. Adelaide M. Harding, general delivery, postoffice, city.

MY DEAR WIFE: I write you this note to request you to
96 return at once to my house with the children. I have always tried to do my whole duty as your husband, and am sorry for whatever mistakes there may have been on my part. I have no fear as to the result of the suit which you have brought against me, but I am confident that it will be held that you have left my house solely without excuse, and that separate maintenance will be denied you, and my children left entirely in my custody. I speak of this suit so that you may know that it is not on account of it that I request your return; but make this request to assure you that I sincerely desire to furnish you with a good home and comfortable and ample support, and further because I especially wish that the children may have the benefit of our mutual love and care. I do not desire that any of our children shall think ill of you if it can be avoided. I have always tried to merit your confidence and sincerely regret that our mutual confidence has been shaken. I will do all in my power to restore it fully again. I think we ought to make concessions and sacrifices, not only for each other's comfort, but also in order to give our children a home and the opportunities and advantages to which they are entitled. If there are any obstacles to your return home at once, I am willing to do what I can to remove the same. Until your suit was brought and the summons served upon me on Monday morning, I was not aware that you had in fact left the house not to return. So far as I knew, you were absent upon
a visit to the country, which I understood from Victor you
97 designed to take. I do not know now where you are—nor where the children are, and have therefore to send this note to your general address, believing that you have made arrangements to have the letters delivered to you under the address which you have given to the post office, and I therefore registered this letter to insure your getting it, and to insure to myself the knowledge that you have received it.

Very truly and affectionately your husband,

GEORGE F. HARDING.

WITNESS: I desire to correct a statement or statements in my testimony as to the time when I was in San Diego and when I was in San Francisco, I think, and when I was in Chicago, before and after the beginning of this suit. Instead of months, I think it must be

reduced to weeks; I do not know precisely, and have not had read to me the statements, but I find that, on looking at some memoranda, I must have been gone from Chicago on that occasion about six weeks, as I interpret it, instead of a longer period. I was hurried home on account of the very heavy litigation in this case; the attachment issued during that period.

Cross-examination (resumed.)

By Mr. WORKS:

98–108 Q. What is your memory in reference to the length of time you were in California, the longest at any time, since 1895, or up to the beginning of this action?

A. I would not be able to say which was the longest, but I mentioned several periods that were long. I think ninety days was the longest period I was here at any one time. It may have been longer, but I would not make it any wider than that.

Q. When I say here, I mean in the State of California.

A. Well, I am in doubt about Santa Monica; I was there a good while at the sea shore.

Q. According to your best recollection, you were not in the State of California longer than ninety days at one time?

A. I think that would be a fair statement; at the same time, I have not so definite a recollection as to be able to say that was entirely true; that that limited the time—I might have been longer here at different periods.

Q. Mr. Harding, I judge from this letter which has been introduced in evidence here that you and your wife had been having some difficulty prior to the time she left the house, February 1st, 1890?

A. Yes, I should think you might call it difficulty; there were difficulties, yes. Her differences began for the first time in October, 1888, let us say about the fifth or tenth of October—say the fifth, and they lasted, with intervals of adjustment, up to the time she left the house.

* * * * * * *

109 Q. When did you first become aware of the fact that your wife had left you for good?

A. I should think I would be inclined to infer that from
110 filing such a bill. That is the first knowledge I had of why she left or whether she left, and I think there was a period of uncertainty there that I was under, until she was in front of my house passing with her two children, I think, to see a neighbor, and I invited her in, and then when she declined to return of course I—that it would be permanent, I did not know—you observe in my answer under oath in March, 1890, I invited her back and could not know that she did not intend to return. On the 5th day of February, she passed the house, and came in with her two children

at my invitation. I first saw a copy of this bill that was filed, probably on the morning that the bill was printed—I was astounded—in the Chicago papers—to see it, printed full length. It was printed in full. I read it. I cannot tell what day's paper it was in.

Q. Was it prior to the 5th at the time you had this conversation with her?

A. I think it was. Oh, yes; I think so. Yes, it was prior to that, that is my recollection, prior; it may have been on that morning, or may have been on the morning of the third. I am inclined to think it was on the very morning when it first appeared—or in the evening paper, wouldn't it be—or perhaps the next morning, it would be naturally—I am now guessing. It was either on the 3rd, 4th, or 5th. It was before I had this conversation with her, at any rate. That reading of that bill did not acquaint me with the fact she had left my home for good. I did not realize from the
111 filing of this bill she had left me finally. I thought she—I thought—that was my interpretation of it for some little time—I was astounded, as you would be, if struck by lightning, a good deal.

Mr PUTERBAUGH: I desire to offer, in connection with the plaintiff's testimony a portion of his sworn answer appearing on page 39 of this record as follows:

"Defendant further answering, says, that complainant has left "the home of defendant, and is now living separate and apart from "him, without excuse therefor, and wholly of her own fault, and "without the fault of defendant; and defendant upon learning of such "abandonment and desertion by complainant immediately sent re-"peated and urgent invitations to complainant to return to his "house, and has persisted almost to the time of the filing of this an-"swer herein, in earnest efforts to adjust, if possible, the differences "between complainant and this defendant, and to that end has used "every honorable means and resource at his command, out of his "own self-respect, and from love of his children, and from a desire, "at this late period of life, to avoid the disgrace and scandal of this "litigation. And from these same motives, notwithstanding the "misconduct of complainant, the defendant has all the time desired "and requested, and still desires and requests that she return to "his home, and take and retain her place there as his wife, and as
"the mother of his children, in which event defendant will do
112 "all in his power to fill the remaining days of her life with
"happiness and peace."

Plaintiff here rested.

Mr. WORKS: Judge Puterbaugh, I suppose you will admit that in the case of Harding *vs.* Harding, No. 79,020, in the circuit court in and for Cook county, in the State of Illinois, the Adelaide M. Harding, who is defendant in this action was complainant, and that George F. Harding who in this action is plaintiff, was defendant.

In other words, that the plaintiff and defendant in this action were parties to that action are the same ones who were parties to that action and there were no other parties to that action.

Mr. PUTERBAUGH: Yes. That the plaintiff in this action was the defendant in that action, and the defendant in this action here in California was the complainant in that action.

The COURT: I understand it.

Mr. WORKS: I offer in evidence a certified copy of the record in the circuit court of Cook *county, Illinois, in this* action concerning which we have been stipulating, the case of Adelaide M. Harding *vs.* George F. Harding. I will offer it in evidence and ask to
113 have it marked as Defendant's Exhibit "A." It is as follows:

UNITED STATES OF AMERICA:

STATE OF ILLINOIS, } *ss:*
County of Cook, }

Pleas before the Honorable Richard W. Clifford, one of the judges of the circuit court of Cook county, at a term thereof begun and held in the court house at Chicago, in said county and State, on the third Monday (being the 20th day) of November, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-fourth.

Present, Honorable Richard W. Clifford, one of the judges of the circuit court of Cook county, State of Illinois.

Chas. S. Denem, State's attorney.

Ernest J. Magerstradt, sheriff.

Attest: JOHN A. COOKE, *Clerk.*

B- it remembered that heretofore, to-wit, on the 3rd day of February, A. D. 1890, a certain bill of complaint was filed in the office of the clerk of said court, in words and figures following to-wit:

114 STATE OF ILLINOIS, } *ss:*
County of Cook, }

Circuit Court.

To the honorable judges of the circuit court of Cook county, Illinois, in chancery sitting:

Your oratrix, Adelaide M. Harding, humbly complaining, showeth unto your honors that on the 7th day of November, 1855, at Peoria, Illinois, she was married to George F. Harding, defendant herein, that she resided with her husband at Peoria until 1861, when they went to Europe to spend a year, that upon their return from Europe

in 1862 they came to reside in Chicago, in said Cook county, and have ever since resided and still do reside in said last named city.

That as the fruit of said marriage there have been born to your oratrix and her husband seven children who are all living and whose names and ages are as follows: Abner Clark Harding, aged thirty-one years on December 31st, 1889; Victor M. Harding, aged twenty-three years on April 25th, 1889; George F. Harding, Jr., aged twenty-one years on August 16th, 1889; Adelaide Harding, aged nineteen years on September 5th, 1889; Beatrice Harding, aged sixteen years on August 20th, 1889; Susan Grace Harding, aged fifteen years on December 10th, 1889; and Madeline Harding, aged eleven years on November 18th, 1889.

115 The said Abner Clark Harding is now married and lives away from his parents, though in the said city of Chicago; the others of said children have always lived with their parents, except as hereinafter stated.

Your oratrix, further complaining, shows unto your honors that during the whole period of her married life she has conducted herself towards her husband and children as a true, loving, faithful and devoted wife and mother, that she has at all times and in all things made the comfort and happiness of her husband and the education and welfare of her children the paramonnt concern of her life and has devoted herself always and unreservedly and almost exclusively to the duties connected with her family and her home.

That upon the death of his father, which occurred July 19, 1873, the defendant inherited a large fortune and since that time he has been a man of large wealth, amounting to a million dollars or more and has been in receipt of a large and certain income, which matters will be more fully referred to hereafter.

That since the year 1872, they have lived at number 2536 Indiana avenue, which is a large and commodious house owned by the defendant and situated in one of the best residence localities in said city of Chicago.

That until recent years, your oratrix and her husband
116 lived happily together, he treating your oratrix with kindness, affection and consideration, and giving your oratrix his companionship and love; that until the month of October, 1888, he always provided liberally for the support and comfort of your oratrix and accorded to her that position and authority in the household to which she was entitled as wife and mother; that for a great many years they have had in the way of servants, a coachman, a woman two days in the week to wash and iron, a cook, a second girl, a nurse or housekeeper and a woman to sew as occasion required, all of whom, except the coachman, have been at all times under the control and management of your oratrix; that her said husband has also for a great many years kept in the stable in the rear of their dwelling not less than five or six horses and a variety of fine and expensive carriages and vehicles, all of which were at all times until October, 1888, at the command and service of your

oratrix and almost for her exclusive use, her said husband making very little use of the carriage except when going out with your oratrix.

That until October, 1888, your oratrix had credit at some of the principal dry goods and other stores of Chicago dealing in household supplies, and was accustomed to obtain at such stores upon the credit of her said husband whatever she required for the house or for clothing for herself and children.

That until about the year 1880, your oratrix's said husband kept his father's residence in Monmouth, Illinois, as a summer
117 home for his family, and they were accustomed to spend their summers there except when traveling abroad. After about the year 1880 they were accustomed to spend their summers at some place on the Atlantic sea board, and this practice was continued until the year 1888 inclusive, except when they were in Europe, and except the year 1887, which was the only summer spent in Chicago prior to 1889.

That on four different occasions the defendant took your oratrix and children to Europe, remaining from several months to a year or more each time and giving them the pleasure and advantages of foreign residence and travel.

Your oratrix, further complaining, shows unto your honors that the foregoing particulars will suffice to show the style and manner in which your oratrix had been accustomed to live and be supported by her said husband prior to October, 1888, all of which was far within the means of said defendant as will hereafter appear; that your oratrix cannot state the exact amount of expense which the defendant incurred on account of his home and family, but according to the best information and belief of your oratrix it has not been less than fifteen thousand dollars a year for several years preceding the last mentioned date.

That in October, 1888, said defendant began towards your oratrix a systematic course of unkind, abusive and cruel treatment, which necessarily and inevitably rendered your oratrix's life unhappy and miserable, and which he continued with increasing severity
118 and cruelty until the first day of February, 1890, when in consequence of such treatment and after exhausting all means of reconciliation she left the defendant's house and has ever since lived separate and apart from him.

Your oratrix, further complaining, showeth unto your honors that during all their married life until about the middle of October, 1888, your oratrix and said defendant had been accustomed to occupy the same room and bed; that about the time last mentioned said defendant without any cause whatever left the room and bed they had jointly occupied, and has ever since occupied a separate room and bed from that occupied by your oratrix, and has ever since refused to live and cohabit with your oratrix and his wife; that at about the same time the defendant forbid all the merchants with whom she had been accustomed to trade upon credit, as above related, to

give your oratrix any further credit whatever and told them that he would pay no bills contracted by your oratrix, and at the same time upon the pretense of desiring to buy for cash instead of upon credit proposed to provide your oratrix with the sum of fifty dollars a month in lieu of the credit she had been accustomed to have as aforesaid. But your oratrix states that said defendant only furnished said sum of fifty dollars a month until February, 1889, since which time he has given your oratrix only the sum of one hundred dollars, and that the money so provided amounted since Oc-
119 tober, 1888, to about the sum of three hundred and fifty dollars, has been altogether inadequate to provide for the personal expenses of your oratrix in the manner in which she has been accustomed to live.

That since about the middle of October, 1888, said defendant has deprived your oratrix of the use of the horses and carriages and your oratrix has not had the use thereof except on a few special occasions and by special permission of the defendant; that the defendant has from time to time pretended to allow your oratrix to have the use of a carriage on certain days of the week and for a limited number of hours at a time, but has at the same time made such limited use of the carriage dependent upon the convenience and dictation of the coachman and has instructed or encouraged the coachman to be insulting and dictatorial towards your oratrix and has compelled your oratrix to submit to such insults and dictation. The said coachman has been permitted to fix the hours when your oratrix should go or return and even decide whether your oratrix should go at all, and one occasion, while your oratrix was calling at the house of a friend the coachman drove away and left your oratrix to return on foot. Your oratrix complained to defendant of such treatment on the part of the coachman, but such complaints were never followed by any change in his conduct toward your oratrix and so any attempt to use the carriage became the source of more annoyance and humiliation to your oratrix than to go without it.

120 Your oratrix, further complaining, says that for many years she has had the control and use of an iron safe in the house where she lived which locked with a combination lock, the combination to which was known only to your oratrix; that in this safe your oratrix was accustomed to keep her jewelry, various personal papers and correspondence, and also valuables belonging to the house; that about October 13, 1888, said defendant broke open said safe and took therefrom all the jewelry and papers of your oratrix contained therein; that he retained the said jewelry to the annoyance and discomfort of your oratrix until October 1889, and then returned it your oratrix by one of their sons and that he still retains, or at least has not returned to your oratrix, the papers and documents taken from said safe.

That since October, 1888, the said defendant has withdrawn himself entirely from the society and companionship of your oratrix and

has treated your oratrix with studied neglect and indifference. He has seldom within that time taken a meal with the family, and spends the time when at home mostly in the privacy of his own room. He avoids meeting your oratrix and as far as possible ignores her. He never speaks to your oratrix except to request some favor from your oratrix which he cannot otherwise obtain, such as the signature of your oratrix to a deed or mortgage or for the purpose of loading your oratrix with abuse. He has re-
121 peatedly since October, 1888, in the presence of their children denounced your oratrix as a thief and a liar, and has berated your oratrix with violent and abusive language. He has repeatedly stated that he would free his property from any claim of your oratrix and that your oratrix should never have another cent of his money.

That said defendant has endeavored by a system of rewards and punishments and threats of disinheritance to persuade or force their children to take sides against your oratrix, and to join and uphold defendant in his unkind and abusive treatment of your oratrix. He has rewarded those of the children who have put slights upon your oratrix and upheld them in unkind, annoying and abusive treatment of your oratrix, and has punished those who have refused to join in such treatment and have given your oratrix sympathy and support, by withholding money from them and denying them proper clothing and the means of pleasure to which they have been accustomed.

In July last, the said defendant turned his eldest daughter out of doors for no other reason than her adherence to your oratrix and her refusal to become a tool of the said defendant in the persecution of your oratrix, and compelled the said daughter without money or credit to depend, for the time being, upon the kindness of friends for the necessaries of life, and although the said defendant requested said daughter's return in October, yet he drove her forth again for the same cause a month later with blows and violence and abu-
122 sive language, and has forbidden her return to the house from that time to the present.

That said defendant by every means in his power, has endeavored to alienate the children from your oratrix. That said defendant's conduct with respect to the children has been pursued for the purpose of wounding and crushing your oratrix through her love for them, and has been the cause of great pain and misery to your oratrix as well as of great injury and unhappiness to the said children.

Your oratrix, further complaining, says that said defendant during the year prior to November, 1889, repeatedly threatened to discharge all the servants and command them to take their orders and directions from him, the said defendant, and to disregard the orders and directions of your oratrix and as far as possible incited them to be insubordinate and disrespectful and insulting to your oratrix — as far as possible deprived your oratrix of that position of authority and

control in the household to which she was entitled. That about the middle of November last, said defendant, putting into execution the threats so frequently made before, did discharge and send away all the servants, except the coachman who was retained for the said defendant's accommodation only, and except the woman to wash and iron who has been permitted to come two days in the week, as formerly. That in consequence of such discharge of the servants your oratrix, though wholly unused to such exertion,
123 was compelled as far as possible to perform the labor and drudgery about the house for which three servants had theretofore been employed and deemed necessary. That your oratrix was thus compelled to and did cook and clean, build fires and carry coal and perform whatever menial service was necessary to be done about the house so far as she was able. That the unusual exposure, exertion and lifting brought upon your oratrix an attack of lumbago followed by influenza and other complications, and your oratrix became seriously and painfully sick and confined to her bed and under the care of her family physician for the space of about two weeks; that during this time said defendant never came near your oratrix, and told the children that your oratrix was shamming, and found fault with certain of the children for taking care of your oratrix while she was thus prostrated with sickness.

Your oratrix, further complaining, says that at the same time that said defendant discharged the servants as aforesaid, he also forbid your oratrix to purchase supplies for the table on credit, and forbid the dealers in such supplies with whom they had been accustomed for years to trade, to furnish anything on credit, or on the orders of your oratrix, and left the procuring of such supplies wholly to their said daughter, Beatrice, to whom he has supplied money for the purpose, but in what amounts your oratrix cannot state, and has
124 compelled your oratrix to make requests for such supplies to said Beatrice, who sometimes fulfills them and sometimes neglects or forgets to do so, being very busy with her school work and not accustomed to any responsibility of any kind; that in consequence your oratrix has often been without necessary supplies for herself and the family, and your oratrix, with such of the family as took their meals at home, was obliged to subsist upon insufficient food; that on one occasion, in consequence of the neglect of said Beatrice to purchase a list of supplies requested of her, your oratrix and suchof the children as were at home had to live from Saturday evening until Monday evening upon what could be made from corn meal and flour. That said defendant usually takes his meals at the clubs to which he belongs and so is not concerned with what the family have at home.

Your oratrix, further complaining, says that in many other ways and particulars than as above set forth, the said defendant has wronged, abused and mistreated your oratrix, and contributed to render her life in the house with him miserable and unendurable; that being advised that any further recital of such treatment is un-

necessary and would tend to undue prolixity, your oratrix omits the same but craves leave to make proof thereof as if set forth at length, and also to insert the same, or any part thereof, by amendment, should it at any time become necessary or advisable to do so.

125 Your oratrix, further complaining, says that the treatment to which she has been subjected, as aforesaid, by the said defendant, has impaired the health and threatened the life of your oratrix; that she was advised by her family physician at the time she was sick, as aforesaid, that such sickness was caused by her unusual exposure and exertion in doing the work and drudgery of the house, and that a return to and continuance of the same exposure and exertion would be likely to be followed by further and more dangerous prostrations; that said treatment of your oratrix by the said defendant has destroyed the happiness of your oratrix and has necessarily rendered her life in the same house with him miserable and unendurable.

Your oratrix, further complaining, says that she has ever been a loving, faithful and devoted wife to the said defendant; that she has never given the said defendant ground or occasion for his unkind and cruel treatment of her, as aforesaid, and that said defendant's conduct is without provocation, excuse or defense.

Your oratrix, further complaining, says that during the past year she has repeatedly tried to bring about a reconciliation between herself and the said defendant, but all her efforts have proved unavailing; that the defendant's conduct towards your oratrix has grown continually more cruel, humiliating and unjust, and finally on the third day of February, 1890, your oratrix having endured the defendant's said treatment for more than a year, and de-

126 spairing of any amelioration in his conduct, withdrew from his house and ever since has been and still is living separate and apart from the said defendant without fault on her part.

Your oratrix, further complaining, shows unto your honors that during her long life with the defendant she has come to know much about his property and income, and she states upon information and belief, her information being derived principally from the defendant himself and from those who have charge of his property as his agents, or been connected with his office, that the defendant owns property in Chicago as follows: The premises number 170 East Madison street; the premises number 155 and 157 East Washington street; one-half of the Mentone block, situated on the corner of Erie and Dearborn streets; more than one hundred dwelling houses situated in different parts of said city, but mostly in what is known as the South Side; also other real estate of considerable value which your oratrix cannot more particularly specify; that said defendant owns more than eighty improved farms situated in different parts of Illinois and embracing some of the most valuable farming lands in the State, said farms being located principally in the counties of Warren, Mercer, Henderson, Iroquois and Peoria; that said defend-

ant also owns a valuable farm at Racine, Wisconsin; a tract of land of the value of about $50,000, at Geneva Lake, Wisconsin, the title to which is in the name of John Johnson, Jr.; that said de-
127 fendant also owns wild or unimproved lands at various points in Illinois, Wisconsin and Iowa; that said defendant also owns nearly all the stock of the Firemen's Insurance Company of Chicago, and that his interest in said company is of the value of $150,000 to $200,000; that defendant has other personal property which your oratrix is unable to describe.

Your oratrix further states that she has no means of giving an accurate or legal description of the defendant's real estate, and craves leave to insert the same by amendment if such course shall be deemed necessary or advisable.

Your oratrix further states, on like information and belief, that said defendant is worth over and above all his debts and liabilities from two to three millions of dollars; that his gross income exceeds the sum of one hundred and twenty thousand dollars a year, and that his net income is not less than from seventy-five to one hundred thousand dollars per annum.

Your oratrix, further complaining, shows unto your honors that said defendant has not within the last two years, met with any serious financial losses or reverses, but that during the past few years the defendant has steadily and materially added to the amount and value of his property, and during the same period the aggregate amount of his income has increased from year to year, and that said defendant has never been in a position in which he was better able, than since October, 1888, to provide liberally for the support and maintenance of his wife and family.

128 Your oratrix, further complaining, says that the children, Susan and Madeline, prefer to live with your oratrix; that they are still of tender age and require a mother's care and direction; that defendant has of late years given but little of his companionship to his daughters; that the defendant is unable to give to the said children that constant care, counsel, direction and oversight which young girls growing into womanhood require, and that the best interests of said children will be conserved by placing them in the custody of your oratrix; that as to their daughter, Beatrice, she ir now sixteen and one-half years of age, and should be allowed to choose for herself whether she will live with your oratrix or said defendant.

The premises considered, your oratrix prays that said George F. Harding, whom your oratrix makes defendant to this, her bill of complaint, may be summoned in accordance with the statute and make full, true and perfect answer to said bill, but not under oath, his answer under oath being hereby waived; that upon a final hearing hereof it may be found and decreed that your oratrix is living separate and apart from said defendant without fault on her part, and that said defendant be decreed to provide your oratrix with support and maintenance in accordance with the statute in such

case made and provided during the time she has so lived or may continue to so live separate and apart from said defendant to
129 be paid or secured to your oratrix by the said defendant in such manner as may be just and reasonable, and that the custody of the said children, Madeline and Susan, and of the said Beatrice, if she chooses to live with your oratrix, may be awarded to your oratrix, and the said defendant be decreed to pay your oratrix for their support, maintenance and education such sum or sums as may be reasonable, and that in the meantime, and until such final decree, your oratrix may have the custody of the said Madeline and Susan, and of said Beatrice, if she should choose to live with your oratrix; that defendant be required to pay your oratrix a reasonable sum or sums for her support until the final hearing, and for the support of the children of whom she has the custody, and that allowance be made to your oratrix from time to time, to be paid by said defendant to enable your oratrix to prosecute her suit, and your oratrix also prays for such other, further or different relief as the facts may warrant and to equity appertains.

(Signed) ADELAIDE M. HARDING.
JOHN S. COOPER,
STILES & LEWIS,
Solicitors and of Counsel.

And afterwards, to-wit, on the 2nd day of May, A. D. 1890, a certain amended bill was filed in the office of the clerk of said court, in words and figures following, to-wit:

130 Insert between the second and third lines on page nine of said bill the following allegations, to-wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court.

ADELAIDE M. HARDING } A Bill.
vs.
GEORGE F. HARDING. }

Amendment to the Bill of Complaint in this Case Made Pursuant to Leave of Court.

Your oratrix further represents unto your honors that the said defendant both before and since October, 1888, at Chicago, in said county, and at divers other places in Illinois, and elsewhere, has committed adultery with a woman sometimes going under the name of Mrs. A. R. Lewis, and sometimes under the name of Madam von Louis, or Madam Louiy.

And your oratrix further represents that she first came to the knowledge of the defendant's adulterous connection with said woman by accident in August and September, 1888, and that about October, 1888, the defendant became aware of the fact that your oratrix possessed such knowledge.

131 Your oratrix further charges upon information and belief that said defendant has committed adultery with divers other persons whose names are unknown to your oratrix with the exception hereinafter stated, the times and places of such acts of adultery being also unknown to your oratrix at the present time. The exception above referred to is that of one Mrs. Lathrop, with whom your oratrix alleges, the said defendant committed adultery at divers times in the city of Chicago, and elsewhere, in the years 1876, 1877, and 1878. The said defendant's adultery with said Mrs. Lathrop first became known to your oratrix since the filing of the original bill in this case.

Your oratrix, further complaining, shows unto your honors that said defendant has spent and squandered large amounts of money and property upon lewd women and especially upon the said Mrs. A. R. Louis, and that, at the same time that the defendant was compelling your oratrix to go without the ordinary necessaries of life and to do the drudgery of the household as heretofore related in this bill, he was supporting the said Mrs. Louis in ease and luxury.

STILES & LEWIS,
Sol's for Complainant.

JOHN S. COOPER,
Of Counsel.

132 And afterwards, to wit, on the 19th day of May, A. D. 1891, a certain amended bill was filed in the office of the clerk of said court, in words and figures following, to-wit:

STATE OF ILLINOIS, } ss.
County of Cook, }

In the Circuit Court of Cook County.

ADELAIDE M. HARDING }
vs. }
GEORGE F. HARDING. }

Now comes the said complainant, and by leave of court first had and obtained, amends her original bill herein by striking out the word "third" in the fourth line of the tenth page, and by inserting in its place the word "first."

(Signed) ADELAIDE M. HARDING.
JOHN S. COOPER,
STILES & LEWIS, *Her Sol'ors.*

Be it remembered that heretofore, to-wit, on the 19th day of March, A. D. 1890, a certain answer was filed in the office of the clerk of said court, in words and figures following, to-wit:

133 STATE OF ILLINOIS, } ss:
County of Cook, }

Cook Circuit Court. In Chancery.

ADELAIDE M. HARDING }
vs.
GEORGE F. HARDING. }

Answer of George F. Harding, Defendant.

To the honorable the judges of the circuit court of Cook county, in chancery sitting:

Your defendant, George F. Harding, comes and files this his answer to the bill of complaint filed herein against him by Adelaide M. Harding, and saving and reserving unto himself all benefit of exception to the manifold errors and insufficiencies of said bill, for answer, says:

That he admits,

(1st.) That the plaintiff is his wife, and that she was married to him on November 7th, 1855, now nearly thirty-five years ago, and that they have resided in this city since November, 1862, for nearly twenty-eight years.

(2) That they have the children born to them at the dates named in said bill, seven in number, four of whom, consisting of
134 three sons and the daughter, Adelaide, are of age, and three, being the daughters Beatrice, Susan and Madeline, respectively, and in the order named, of the ages of about 17, 15 and 11 years.

(3) That the eldest son, A. C., is married, with two sons, 8 and 10 years of age, and lives away from home, while all the other children up to the time of the unfortunate difference between the parents have made their homes with the defendant.

Your defendant, further answering, denies that the plaintiff "has "conducted herself towards her husband and children during the "whole period of married life, as alleged in said bill, as a true, "loving, faithful and devoted wife and mother, and has at all times "and in all things made the comfort and happiness of her husband, "and the education and welfare of her children the paramount aim "of her life, and has devoted herself always and unreservedly, and "almost exclusively, to the duties connected with her family and "her home."

That, on the contrary, defendant alleges that the plaintiff was, during the latter part of her married life and after twenty years of

semi-invalidism become distinguished for her devotion to herself, and to her own interests, exclusive of those of her husband and her children, and has placed her own individual and personal interests and inclinations paramount to all others.

135 As such she has lived abroad in the gay capitals of Vienna and Paris, then at Heidelberg, Ems and Nice and taking journeys over Europe, through Spain and into Africa, has expended sometimes with, and sometimes without her children, nearly five years, as stated in said bill, and upon other journeys in this country and in visits and residences at the sea shore, and elsewhere has expended away from her home and husband, certainly one-third and probably half of her married life. These absences have been made and planned by herself, sometimes under the color of the interest of the children, but always with reference to her own pleasures, education and personal advancement, and frequently upon the plea of ill-health, and with little or no consideration for the interests of her husband and her friends.

That in a few weeks after her marriage, in 1855, she demanded of her newly married husband the making of a will of all his property in her favor, to the exclusion of all his friends, and this will and testament was immediately made in her favor, and has continued up to the present time to be the last will and testament of defendant.

That defendant to the best of his ability has always gratified the wishes expressed by her during his whole life, except as hereinafter stated.

That the only wish of the said plaintiff's left ungratified by him, so far as he is able to recall, and to the best of his knowledge,

136 information and belief, was her request early made, and many times repeated, to divide his property with her.

That it has been the paramount wish and effort of her life to realize the independence which such division of his property would give her; that to this end she has bent her energies for many years, in secret ways acquiring a handsome fortune from the defendant without his suspicion or knowledge.

That during the period since October, 1888, and long before, the said plaintiff has been in possession of large sums of money entrusted to her by defendant, for the payment of family expenses, and which she failed so to expend, concealing the fact from defendant, and which she from time to time, without the knowledge or consent of defendant, invested in first railroad mortgages, bonds and first-class railroad stocks, immediately convertible into money

And defendant alleges that the expenditure of one-hundredth of this concealed hoard of her husband's money, at the time of any of the alleged privations, or cruelties, set forth in said bill, would have enabled her to have lived in luxury, instead of enduring the said privations complained of; that every one of the said privations was voluntary and self-inflicted, endured so far as they were in truth endured, for the purpose of posing as a martyr, and converting the

same in this court in this case, into the profits of separate maintenance.

137 Your defendant, further answering, alleges that said privations and sufferings were not only artificial and manufactured, so far as any part thereof are truly *or* character, or number, or for the time therein stated, stated in said bill, but that the same in most instances never existed at all, as therein stated, but are exaggerated, distorted and perverted statements of facts in most cases and are dependent for the character attributed to them, upon partial statements of the facts, the truth and the whole truth in every case being sufficient to disprove every one of them, so far as the same are claimed to support the charge of severity or cruelty against this defendant.

Your defendant, further answering, admits: That until recent years, said plaintiff and husband lived happily together, he treating her with kindness, affection and consideration, and giving her his companionship and love, as alleged in said bill, and he further admits, as alleged in said bill, "that until the month of October, "1888, he always provided liberally for the support and com- "fort of her and his family, and accorded to her that posi- "tion and authority in the household to which she was entitled "as a wife and mother," and has kept for many years servants as therein stated; and that he has kept in his stables a coachman and horses, and vehicles, but not of the kind.

That the truth is, that for the greater part of the time he has kept in his stable but two or three horses; that the horses to a

138 greater number have simply accumulated against his will; that but for a short time, he has kept six horses, not for his own use altogether, but one or more for the use of his carpenter and others connected with him in business, and largely because he had not been able to dispose of them, needing at no time more than two or three horses, which have been chiefly, if not exclusively, used by his wife, he, as the bill states, "having made very little use of them." That all these horses were of small value, worth perhaps at the most $150 each, and unsalable at that price, and that in like manner the carriages and vehicles were many of them old, the most valuable, from ten to twenty years, and altogether were not worth more than $1,000 or $1,500; that instead of keeping his coachman and horses six in number during the year, as stated in said bill, it was his habit to keep his horses in the country a large part of the year, and never, with the exception perhaps of a single year, has he kept either a coachman or horses during the summer months, and until late in the fall.

Your defendant, further answering, admits, that until October, 1888, the plaintiff had credit at some of the dry goods stores in Chicago, dealing in household supplies, and was accustomed to obtain at such stores upon the credit of her said husband, whatever she required for the house, or for clothing for herself or children, as alleged in said bill; but your defendant alleges that while such was

the fact, that this dealing on credit was persisted in by the said
139 plaintiff against his will, and that it was stopped by the defendant more than once within the last five years upon notices, not to allow such credit, given to said shop-keepers, and was attempted to be stopped by him on such notice at other times, and again resumed against his will and protest, prior to said date, and that your defendant was defeated in his effort to deal only for cash, as was his desire, by the willful and deliberate act of said plaintiff, knowing well his wishes, and deliberately disregarding them, and being aided and encouraged therein by the tradesmen whose intent it is to encourage foolish women to excessive expenditure under the credit system; and defendant alleges that his return to the system of dealing only for cash, and stopping the making of bills by plaintiff after October, 1888, was merely resuming a proper course that he thought and meant should be followed, and in which he was in the right; and that, as hereinafter shown, he had in her conduct fresh reasons for insisting upon the abandonment of this loose and extravagant credit system.

Defendant admits that he inherited a large fortune in 1874, but denies that it amounted to a million dollars or more; and that since that date as alleged in said bill he has been in receipt of a large and certain income; but on the contrary he states that the fortune which he inherited was largely in country farm, from which the income has been variable and uncertain, and of late years has amounted to only a small sum.

140 That he has increased, he admits, his gross income, by expending a large sum of money in building in this city, and in improving the country farms, but in so doing he has been compelled to borrow large sums of money, by which he has greatly increased his indebtedness; that a large part of his property is unimproved and brings no income; that his taxes and assessments are very heavy, amounting in all to about the sum of, as nearly as he can ascertain, $17,000 per year. To this must be added insurance expense amounting to about $3,000 per year. That the interest upon his indebtedness, chiefly secured by mortgages upon property is about the sum of $36,000 per year; that the repairs upon the property, and the necessary improvements to keep it occupied, and in a line with other property, exceed the sum of $15,000 per year, to which should be added a large sum annually to meet the depreciation in the buildings, which though repaired or improved, become deteriorated and antiquated, which sum can only be estimated and depends upon the life of the building, but said amount upon the best estimate he is able to make, is not less than the sum of $15,000 per year.

That in addition out of his income is to be taken the expenses, costs, and necessary running expenses of the buildings and lands which are in his care, and from which the income is received, including salaries to the amount of $15,000, as nearly as can be esti mated or ascertained.

141 In addition to this must be deducted, as a loss from his annual income for rent unpaid, the sum of at least $7,500 per year, and to be deducted from his nominal income for premises not let, the additional sum of $7,500 per year.

That his nominal gross income, upon the theory that all of his property is let, and occupied, and the rent is paid, and including uncertain dividends upon insurance stocks, is about the sum of $120,000, but that he has never actually received more than the sum of about $95,000 during any one year, and that his average annual gross receipts for the last ten years, have not equalled the sum of $65,000.

Your defendant further alleges the truth to be that, instead of the fact being, as stated in said bill, that his net income is the sum of $75,000, his net income, after making the necessary deductions for taxes, costs, expenses, insurance, repairs and other necessary outgoes, does not exceed the sum of $15,000 per year, and this, without allowing any sum whatever, to reduce, by way of a sinking fund, or otherwise, his large indebtedness.

That he has never thought it prudent to expend more than was absolutely necessary, by reason of such indebtedness, and his expenditures have been increased, beyond his intention, but have never yet exceeded, at home the sum of about $8,000 per year, and have never exceeded at any time, the sum of $12,000,

142 including therein the expenses of two sons at Cambridge, and other sums spent upon the education of his children; that including the rental value of his house, as furnished, which is not exceeding $1,200 per year, he has never expended at home more than $9,000 per year, and has not, on a average for the last ten years, expended this sum; and that, in his opinion considering the amount of his indebtedness, the amount of his expenses and expenditures at home should be reduced, and whenever his creditors required it, will have to be reduced.

That a portion of the annual rents to the amount of not less than $6,000 is upon property in litigation, and for which suits are pending against the defendant, and the result of which is uncertain; that he is defendant in litigations in which large sums are claimed against him, in the aggregate of not less than $200,000, which sum in prudence should be added to his indebtedness until the amount of such indebtedness shall be ascertained. That his admitted indebtedness, independent of this disputed indebtedness, exceeds the sum of $550,000.

That the true inwardness of this most unfortunate and humiliating difference with said plaintiff is not set forth in said bill; that the truth is, that the plaintiff upon alleged information charging marital infidelity against defendant, willingly assumed to credit the same and in order to compel defendant to the coveted division of his property, undertook to find evidence veri-

143 fying it; but failing in this, has undertaken under the legal advice of attorneys under which she has acted ever

since October, 1888, to achieve the result aimed at, viz: an increase of her already large fortune by means of the absurd charges of privation and cruelty contained in said bill; and that every act done, and every word uttered by defendant complained of, has been willfully and deliberately provoked by complainant. That he has endured as quietly as he could the conduct of his wife, who has not hesitated to spread abroad this scandal, believing her to be insane on particular subjects, and desiring on that account to deal with her more tenderly; and when she undertook to add to the role of compelling him to surrender his property, by threats of public exposure, the further and later refusal to do her duty as wife in attaching her signature to necessary mortgages and instruments required for the preservation of his estate, he then undertook, and not until then, most reluctantly, and step by step, and after repeated offers of reconciliation, and warnings of what might be the consequence, to check her action, and this failing to bring home to her, in the most modest and effectual way, a sense of the loss thus inflicted upon him, and through him upon her.

Your defendant, further answering, says, that it is untrue, and he therefore denies, that in October, 1888, without cause, defendant began toward plaintiff a course of unkind, abusive and cruel
144 treatment, or that after exhausting all means of reconciliation, as alleged in said bill, she was compelled by such treatment to leave his house.

On the contrary, defendant alleges the truth to be, that it has been the rule of his life toward the plaintiff to act toward her with the utmost kindness and consideration, and that his love and attention for her is best emphasized by her own declaration repeatedly made, "that her life had been protracted twenty years by his care and attention, and that in consequence she had outlived the natural term of her days;" and that it is not true, and is upon its face incredible that this defendant should suddenly change his course of treatment and subject her to the cruelty charged in this bill.

But, on the contrary, defendant alleges the truth to be, that he continued the same course of treatment to the very last, up to and since the filing of this bill, in no way failing in his duty as a husband, except as the best of men may sometimes fail; that the truth is, he discovered that, under some pretext, as to which he will observe the reticence of the bill, but to which he has briefly alluded, that the plaintiff undertook to carry out the favorite scheme of her life, to-wit, to compel him to divide his property with her, all the while concealing from him the fortune which she had, by indirection, secured; that this was begun in the summer of 1888; and for this she then selected a tool, fit for her purpose, to whom the
145 defendant's destruction would be a labor of love—a lawyer whom she knew had been his mortal enemy for many years, when he should have been, had he regarded benefits conferred, his greatest friend.

On September 5th, 1888, or thereabouts, she carefully employed

this attorney, not her present attorney or attorneys, sent him a portion of her husband's money, then remitted to her for her needs at the sea shore, as she pretended, and she then carefully arranged the plot to entrap her husband, in order to obtain, if possible, some evidence of the alleged crime which she proposed to fasten upon him, with the aid of low detectives by whom she had him shadowed day and night. That defendant was all the while busy with his affairs and in the maintenance and preservation of his property at home, ignorant of this attack, and only learned the details of it about the middle of October, 1888, upon the opening of safes and vaults and other secret receptacles of the plaintiff, who, always distinguished for her secretiveness, here surpassed *herself*.

That after a residence upon the sea shore of nearly five months, she returned in October, 1888, and the defendant, yet ignorant of the plot, was received by her with even more than her usual demonstrations of affection, although she was then fully engaged, and had been long engaged in plotting his ruin; and that when by some chance, the rumor of some charge against him as com-
146 ing from his wife, reached the ears of the defendant, he at once went to her, and asked, as a husband, the information and explanation to which he ought to have been entitled, and entreated her not to believe the stories he had heard as coming from her, offering to abandon his business and go with her abroad, and expressed his astonishment, that after so many years of married life without a cloud, she should without giving her husband any opportunity for explanation, or without any reason or excuse therefor, credit such stories against him.

And defendant alleges that he was then met by her with the statement that she did not care what he did, if he would make a division of his property—that he should begin by making a deed to her of twenty-five farms in Warren county, but no hint was given of wounded affection or anything but such mercenary considerations and defendant avers that this has been the burthen and leading feature of all the alleged attempts at reconciliation by complainant, and she then further added, that unless this was done, namely said farms deeded to her, she could not, and would not live peacefully with her husband.

And the defendant thus put upon his guard, soon found some of the details, step by step and little by little, of the plot on foot, and for this purpose opened the family safe, in which was the family property; that this safe of course, as alleged in said bill, was kept under lock and key by her, and was then found full of the let-
147 ters of her lawyers and reports of the detectives by whom the defendant had been so long shadowed, each and every one of them a good certificate of the moral character of the defendant.

Defendant further alleges that the advice upon which complainant has been acting was mapped out by this attorney, and it is best to set it out in his own choice language, which your defendant here

gives, in the following extracts from said letters, to-wit: "Get full proof of your right to get divorce in the first place, and then with that in hand, bounce him for a divide." "Your alimony in a case of divorce would trouble him. It would be a liberal allowance of property; you could then dicker with him better for a divide without a divorce. For him to part with it would be like taking his heart's blood."

That during this whole period from October, 1888, defendant has missed, from time to time, various articles of his personal property, such as railroad tickets, early, and later, the stubs of checks, and returned checks which disappeared; and on inquiry his said wife has always denied all knowledge as to them, and as to the said detectives, saying that she knew nothing about them; but defendant early distrusting her statements, upon the loss of the first named tickets, having caused the safe to be opened, and the contents thereof taken to his office, failed to find them, but later, upon opening a box at the Fidelity vaults, really owned by her, but kept in the name of her brother, found them, and also proof of the fact
148 that she was then the owner of a large fortune, amounting to not less than $30,000, of which the greater part was, as elsewhere stated, in first-class railroad mortgages and stocks, equivalent to money.

Defendant, further answering, states that he acknowledges that he did, upon opening said safe at the house, unintentionally remove complainant's diamonds therein with his other property to his office, and that she then owned diamonds worth about $2,500, but defendant says he afterwards returned said diamonds, and that the return would have been much earlier, but for the fact that without demanding them or suggesting her desire for them, to punish him, she at once purchased additional diamonds, namely, a dimond ring at the price of $575.00 and caused the same to be charged against the defendant, and caused defendant to be sued therefor.

Defendant further answering, says, that he denies that he left the room and bed they jointly occupied up to the middle of October, 1888, and has since refused to live and cohabit with complainant.

That it is true, on discovering the property and money abstracted from his pocket, in the Fidelity safety vaults, and spies and detectives surrounding him, under the direction of his affectionate wife, and finding her consulting with his enemies and contriving his ruin, and refusing to perform her duties as wife, and giving up her life and the chief part of her time to persecuting and attacking
149 him, and finding her willing to deny the truth to accomplish her ends, that he has used strong language, as he reasonably might, and expressing nothing but the truth, has perhaps used the language described in said bill, or part thereof, or similar language, and in Saxon phrases, stated to complainant what had been done and what had been discovered.

It is further true that he has not of late, been willing to give countenance, by association in public with, or appearance of affec-

tion to, one who was thus acting as his enemy, and trying to destroy him, but it was upon this ground alone, as she was fully aware.

Defendant further alleges that it is not true that he used a system of rewards and punishments in order to persuade or force the children to decide against their mother; but on the contrary, he has always and at all times, urged that they be true to her, treat her with respect and stand by her, however, asking them to distinguish between standing by their mother, and attacking their father. That he has only punished his daughter Adelaide, for improper and undutiful conduct toward him, and her family, and as he reasonably might, but that he has always held his house and home open to her upon a proper acknowledgement on her part, and the promise of better fashions in the future.

Nor is it true that he has withheld money, or clothing, from his children because they have given their mother sympathy, or
150 support; or that he has ever endeavored to alienate his children from her, but he has on the contrary, endeavored to have them respect her. That indeed, so far as the truth is concerned, each of these statements in said bill, could better be applied to the plaintiff; that his children have always, and at all times, treated him with affection, devotion and kindness, with the single exception of the daughter Adelaid, who has been absent a long time at Lasell seminary, Aburndale, Mass., and whose actions were at the instance and inspiration of her mother, and due rather to impulse and ignorance, and her mother's evil influence than to any other cause.

Defendant, further answering, states, that he has at all times abundantly supplied all the necessaries and comforts of life to complainant and his family, and up to the filing of this bill before and after the discharge of a part of the servants as described in said bill, and as liberally as ever, during the entire period, from the closing of November, 1889, to the first of February, 1890, furnished money and placed it in the hands of his daughter, Beatrice, about seventeen years of age, who was the best fitted, to honestly and faithfully apply it, and act as housekeeper in the absence of the regular housekeeper; and that all the charges and insinuations in said bill, that the said Beatrice did not furnish the necessary supplies, or neglected so to do, as alleged in said bill, are untrue, and that if, in any part true, they could have been righted at any time by a little
151 care, or by applying to defendant, who was on hand during the whole period.

That in any event the alleged corn meal and flour episode, and all the stories of labor, hardship, etc., in said bill, are all untrue in substance—consisting at most, to-wit.—of five women doing their own work with the assistance of a laundress, and a coachman boarding out of the house; but if true in any particular, all these suffering- were self-inflicted by the plaintiff, and could have been ended at any moment, as she well knew, by the use of a single drop of ink, in signing the mortgages and instruments so necessary to the pro-

tection of defendant's property; and it is ridiculous for a woman to set up such stories of privation and sufferings, with many thousands of her husband's money in her pocket, given her expressly to pay her household expenses, and which was never used or expended by her for that purpose; a woman with a fortune in excess of that of most men, and most families, at her command during every hour of the alleged privations!

Your respondent, further answering, admits that on finding his horses and carriages used, and his money expended, as he did find, in promoting a conspiracy to ruin him, that he, merely to prevent this action gave such directions as he thought would prevent it, and to that end he thought it wise that his wife should not be permitted unlimited credit, and returned to the cash system, but supplied money liberally and abundantly during all that time. That
152 it is true that to this end he fixed an amount of money to be expended by his daughters from time to time, and put the money for that purpose in their hands, expending the money for Madeline, the youngest daughter, by the aid of the others, and under the advice of her mother. That he furnished money to the housekeeper without limitation, at all times up to about the last of November, 1889, when she left the house, and afterwards, at all times, allowed, as above stated, to the said Beatrice sufficient money, without any restrictions, for the payment of household requirements and expenses, paying cash for the same. That for the complainant, he furnished, but only as pin money, or for personal use exclusively, the sum of $50.00 per month, paid to her in cash, or upon the bills made by her for her personal use, up to October, 1889, which sum was to be used as she chose in addition to the money given to her, as family expenses, (but which was hoarded up by complainant, and had become a fortune of over $20,000 in cash securities, and a large sum besides, claimed by her as her own personal fortune, and all obtained from the defendant, and his father, for the purpose of the family support, or obtained upon some other account, coming from them, and estimated at fifty or sixty thousand dollars.) That this pin money to be paid in addition was fixed at this sum, but left her in point of fact an unlimited supply, and far in excess of her wants; that she never in her life expended in excess of $100.00 per month for such purposes. That defendant verily believes
153 that both sums of $100.00 and $50.00 (the former fixed in October, 1889) were in access of the money the complainant was in the habit of expending for the purposes mentioned; but when the interest collected and payable to her in shape of coupons and dividends upon the expense money laid up at the Fidelity was added, the sum allowed her for pin money exclusively, (not for the family expenses as alleged in said bill), the money at her command was a net income of $1,500 to $2,500 per year, and at all times, or whenever she chose, she was at liberty to add the principal or the whole of the money given her as family expenses aforesaid, never

appropriated otherwise with defendant's knowledge or consent, and still in her hands to the amount of many thousands of dollars.

That as to carriages and horses, the only regulation made was (except the adjustment of October, 1889) that complainant should not have exclusive use of them; that they should be used upon defendant's order; that he never refused a reasonable request, and perhaps might say, any request upon her part for the use of them, and never permitted or encouraged any coachman in his employ to regulate her hours, or to treat her with any want of respect; but alleges he did discharge the coachman referred to in said bill for the offense alleged, and for the like offenses committed towards others.

But your defendant avers and alleges that said complain-
154 ant sought to create grievances, and desired and tried to aggravate them with a view of filing this bill.

Defendant further answering, says, that the family was never more liberally supplied than during the period complained of—during the year 1888, up to the close of 1889, and that during said years he spent money liberally for the education of his sons at Cambridge, and his daughter Adelaide, at Lasell. That just prior to October, 1889, an arrangement was made by which said complainant was to be paid $100 per month, and an adjustment was had as to the use of the carriages, and the defendant loyally lived up to this agreement, and tendered the money for November, 1889, but the complainant, after agreeing, and being perfectly willing to receive the $100 per month, and exclusive use of the carriage two days in the week, chose to break up said arrangement, for reasons unknown to this defendant, and deliberately refused to sign any mortgages or deeds or other papers whatever for the said defendant, although said mortgages and deeds and documents were each and all of them such as she ought to have signed, and were necessary in dealing with, or using his property to advantage.

That the property of defendant is all, and more than all he is really worth, if indebtedness be regarded, in real estate, including the assets of the Firemen's Insurance Company; that it is necessarily incumbered, because much of his real estate has been purchased subject to incumbrances, or has been incumbered by bor-
155 rowing money upon it, for the purpose of improving it; that it is necessary for him to make and extend mortgages as they may mature, and that such mortgages did mature prior to November, 1889, and complainant utterly refused to permit them to be extended, by refusing to sign mortgages and extensions thereof, that this refusal to permit him to borrow money or to extend his mortgages was done, although much of the property upon which the payments were due had been recently acquired, and was now subject to her dower, and had been nearly paid for, for example the Geneva Lake property, upon which there was only $15,000 due for property worth at least $75,000; that this refusal to unite in a mortgage to pay it was a gross and willful violation of her duty as a

wife. That she also refused to correct a deed conveying a small lot upon Indiana street, 20 x 100 ft.; and defendant avers, that this was the only instance, so far as he remembers, where he requested her to make a deed, during the period of this difference, never hoping to obtain her consent to sell a dollar's worth; that this deed was signed by her after some six months' delay and neglect, she taking at all times a period of delay, sometimes reaching six months, to consult her lawyer, and the deed, when made, proving defective in some small particular, the description not being entirely accurate in the opinion of the purchaser's attorney, she was then asked to correct it, and absolutely refused, saying she would not make any deed or mortgage, or execute any paper; and thereby compelled
156 defendant, as to this property, to give up the contract, for which he was to get $2,300, and at a time when he was overdrawn at bank, and when the smallest consideration for the interests of her family, required that such contract should be carried out; and it was this conduct and repetitions thereof, and worse conduct on complainant's part, that provoked at times harsh language from defendant.

And when mortgages were thus refused to be extended and this deed was refused to be made, defendant notified complainant that if he could not get the said extensions of said mortgages made and if she adhered to her plan to refuse to sign all such papers, unless he would accede to the demands of herself and of her attorneys, to make such a division of his property as to them seemed sufficient, this defendant, in order to bring home to her, the truth of the situation, and feeling that it was wrong in her to compel him to borrow money to enable her to live in luxury, while she denied to him the means of paying his debts, discharged a part only of his servants, three in number out of five, stating that he would re-employ them whenever the mortgages were signed and extended; and defendant alleges that complainant well knew, and was rep-atedly advised during the period from November, 1889, up to the filing of this bill, that she could at any moment recall her servants, and renew her former life, by the use of her pen for a single moment,
157 in joining with her husband in making the necessary payments by mortgages, etc., to keep his property from ruin. But defendant alleges that she refused, with a view to financially strangle him—first threatening him with ruin, and then filing this bill.

Defendant therefore alleges the fact to be that all the acts and injuries and sufferings complained of in said bill are either untrue, or else willfully self-inflicted by said complainant; and a necessary consequence of this high treason to the family relation which he alleges and will prove is nothing other than a determined effort to compel him to give up his property at the demands of herself, upon the penalty of losing it in case he should refuse.

Defendant further answering says that in order to protect his property and to secure the income above mentioned, he has for many

years been, and still is compelled to give his whole time and labor and exclusive attention, to the management and handling of his property, and he verily believes that to such an extent is his personal labor and attention required, that a withdrawal of it would lead to inevitable losses, that would diminish his annual income many thousands of dollars.

Defendant further answering, admits that it is substantially true that he owns the property described in general terms in said bill, except that it is not true that the title to the Geneva Lake property is in John Johnston, Jr., the title thereto being in the joint
158 names of defendant and said Johnston; and defendant does not own a valuable farm at Racine, or other lands in Wisconsin; and defendant denies that he is worth over and above his debts two or three millions of dollars; but if his property were brought to a sudden sale in a crisis, as it well might be, or otherwise, if his indebtedness be not speedily paid, he would not prove worth a half million dollars or perhaps half that sum, and hence it was a great and inexcusable injury and has lead to great losses and mischief to the defendant, and to his estate, the refusal of the said complainant protracted through a year and a half to join him in the necessary deeds and mortgages required to pay his indebtedness, or to arrange and provide for its ultimate payment.

Your defendant, further answering, says, that he denies that the said complainant left his house because unable to endure the privations and cruelties, described, and after exhausting all efforts at reconciliation. On the contrary he alleges the truth to be that she left his home simply because it was necessary to do so in order to maintain a bill for separate maintenance, and that she never made at any time, any real effort toward reconcilitation; that she never as he believes, desired reconciliation, but from the first hour of the employment of the attorneys in September, 1888, up to the filing of this bill conducted herself with an eye single to the effect of her actions upon the maintenance of this case; that as he is in-
159 formed and believes she is of Shaker descent, and as she has advanced in life has become a foe to marriage; that long before the unfortunate differences in question and while living apparently in perfect accord with her husband, she more than once publicly at meetings in the clubs of advanced women, to which she belongs, and privately, expressed this hostility, assigning as her leading objection that marriage fails to give the wife a share in the husband's property which, in advanced phrases, is characterized as the common property, and this, however generous he may be, unless she endures the humiliation of first asking his consent.

Defendant, further answering, says, that all the troubles and difficulties, and alleged sufferings of complainant, mentioned or referred to in said bill, were wholly of her own making, and in nowise the fault of defendant, and defendant has never intentionally been unkind to her in word or act; and all harsh or seemingly unkind language, and every act or word, on the part of defendant, that even

tended toward cruelty, or unkindness, toward complainant, was provoked by her own willful misconduct, at the time; and in no case has the language to, or treatment of her, by the defendant, been more severe than was justified, or excused by the willful provocation, at the time, on the part of complainant. And complainant had, and still hath in her own hands a complete and perfect remedy for all her said troubles, namely, by the mending of her own ways.

160 Defendant, further answering, says that the complainant has left the home of defendant, and is now living separate and apart from him, without excuse therefor, and wholly of her own fault, and without the fault of defendant; and defendant upon learning of such abandonment and desertion by complainant, immediately sent repeated, and urgent invitations to complainant, to return to his house; and has persisted almost to the time of the filing of this answer herein, in earnest efforts to adjust, if possible, the differences between complainant and this defendant; and to that end has used every honorable means and resource at his command, out of his own self-respect, and from love of his children, and from a desire, at this late period of life, to avoid the disgrace and scandal of this litigation. And from these same motives, notwithstanding the misconduct of complainant, the defendant has all the time desired and requested, and still desires and requests that she return to his home, and take and retain her place there as his wife, and as the mother of his children, in which event defendant will do all in his power to fill the remaining days of her life with happiness and peace.

This defendant, further answering, says, that if complainant persists in remaining away from his home, he will still insist on the custody of his minor children; and will make them his special care, and leave nothing undone for the promotion of their welfare and happiness; and as to the two daughters, Susie and Mad-

161 eline, defendant denies that they, or either of them, of their free choice, prefer to remain with their mother away from him, but alleges the fact to be, that complainant has diligently used her influence to poison their young minds against their father, and that freed from this evil influence, defendant believes that they would soon prefer to be and remain in the custody and care of their father.

Defendant further answering denies all the allegations contained in said bill, which he has not heretofore answered unto.

And defendant now having fully answered said bill prays to be discharged with his reasonable costs in this behalf expended.

GEORGE F. HARDING.

WM. J. AMMEN,
Solicitor for Def't.

And afterwards, to-wit, on the 7th day of May, A. D. 1890, a certain amendment to answer was filed in the office of the clerk of said court, in words and figures following, to wit:

162 STATE OF ILLINOIS, } ss:
County of Cook, }

Circuit Court.

ADELAIDE M. HARDING }
vs. } Bill.
GEORGE F. HARDING. }

Amendment to Answer, Pursuant to Stipulation of the Parties, under Date of May 2, 1890.

And now comes said defendant, and saving and reserving, etc., for answer to said bill, as amended on the 2d day of May, A. D., 1890, says that he re-affirms all the statements and allegations of his said original answer to said bill in this case, and for special reply to the amendment aforesaid, states that it is not true that said defendant has at any time or in any place committed adultery with a woman sometimes going under the name of A. R. Louis, and sometimes Madam von Louis, or Madam von Louie, as alleged in said bill. That it is untrue that said plaintiff ever came to the knowledge of said defendant's alleged adulteries with said woman, or that said defendant was aware that said plaintiff possessed such knowledge.

Defendant further answering, says, that it is untrue that he has ever, at any time or place, committed adultery with "one Mrs.
163 Lathrop," as alleged in said bill, or with any other person at any time or place, or at any times or places, as alleged in said bill as amended.

Defendant further answering, says that it is untrue the said defendant has committed adultery at divers times and places in the city of Chicago and other places during the years 1876, 1877 and 1878, with Mrs. Lathrop; nor is it true that said plaintiff ever came to the knowledge of said defendant's adulteries with said Mrs. Lathrop, as alleged in said bill, as amended.

Your defendant further answering, says, that it is not true, that he has spent and squandered a large amount or amounts upon lewd women, and especially upon Mrs. A. R. Louis, or any sums upon such women or upon said Mrs. A. R. Louis, at any time or place; nor is it true that at said time or at other time or times has this defendant compelled the said plaintiff to go without the ordinary necessities of life or to do the drudgery of the household, as alleged in the said amended bill, and while supporting the said Mrs. A. R. Louis in ease and luxury, or otherwise.

Your defendant, on the contrary, alleges that there never was a

moment of the time in the history of said plaintiff during the last ten years when she was not in possession of a fortune approximating $50,000 (the exact sum being unknown to your defendant) consisting as stated in said original answer, of moneys and
164 securities readily convertible into moneys, all of which was derived or received from this defendant and his father, and given to said plaintiff since her marriage for the purpose of being applied for the expenses and support of the family.

Defendant further answering, says, that the real cause of this entire difference is and has been the determination of the said plaintiff to compel said defendant to divide with her his fortune according to the programme of her original attorney, as stated in said answer, which she has religiously followed ever since, and that no compromise, or adjustment or arrangement has ever been possible or practicable with her, although defendant alleges the truth to be that he has offered her twice the sum, in his judgment, that a chancellor would allow her for separate maintenance, in order that she might live in the style and manner, and condition in which for so many years she has been content to live as the wife of this defendant; and that said offers have been made entirely in vain, because of the determination of said plaintiff to demand and compel a division of his entire fortune.

Defendant further answering, says, that he made said offers and endeavored to compromise and adjust the differences with said plaintiff, purely and solely because he felt as a father of seven children and the husband of a wife whose age was nearly fifty-five years, that such differences were not only disgraceful, but that public decency and justice and proper regard for his family, and for
165 public opinion, required from him every effort to prevent an exhibition of his unfortunate domestic difficulty in the courts.

Defendant further answering, says, that he never withheld the sum as before stated in this answer, exceeding a hundred dollars per month, from his ordinary family expenses, and that the withholding of this sum was due entirely to his long expressed determination (after suffering for a year, the refusal upon the part of the plaintiff to sign the extension or renewal of mortgages that had matured), to reduce the family expenses, upon the ground that he could not afford to live as he had lived, while the plaintiff was withholding from him the means to so live, and compelled him to apply his income to the payment of his indebtedness. That all that was done, was done for the purpose of bringing home to said plaintiff, in the gentlest mode possible, the fact that she was strangling her husband financially, and that he could not keep up his family expenses and at the same time pay his debts without her aid in the renewal and extension of said mortgages.

Your defendant, further answering, denies each and every allegation made in said bill as amended, not hereinbefore fully answered unto.

And now, having fully answered said amended bill, your
166 defendant prays to be dismissed with the reasonable costs in this behalf expended, and prays judgment, etc.

(Signed) GEO. F. HARDING.

WM. J. AMMEN,
Solicitor for D'f't.

And afterwards, to wit, on the 3rd day of July, A. D. 1890, a certain replication was filed in the office of the clerk of said court, in words and figures following, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County, June Term, A. D. 1890. In Chancery.

ADELAIDE M. HARDING }
vs. }
GEORGE F. HARDING. }

Adelaide M. Harding, Complainant, to the Answer of George F. Harding to Original Bill and Amendments Thereto.

167 This repliant, saving and reserving to herself now, and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer of the said defendant for replication thereunto, says, that she will aver, maintain, and prove her bill of complaint as amended to be true, certain, and sufficient in the law, to be answered unto; and, that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant without this; that any other matter or thing whatsoever, in the said answer contained, material or effectual in the law, to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed, or denied, is true. All which matters and things this repliant is ready to aver, maintain, and prove, as this honorable court shall direct, and humbly pray-, as in and by her said bill she has already prayed.

STILES & LEWIS,
Sol's for Complainant.
JOHN S. COOPER,
Sol. for Compl't.

And afterwards, to-wit, on the 21st day of May, A. D. 1891, a certain demurrer was filed in the office of the clerk of said court, in words and figures following, to-wit:

168 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County, Term A. D. 1891. In Chancery.

ADELAIDE M. HARDING }
vs. } Term No. 1175.
GEORGE F. HARDING. }

Demurrer of George F. Harding, Defendant, to the Bill of Complaint, as Amended, of Adelaide M. Harding, the Above Named Complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things, in said plaintiff's bill of complaint as amended, contained, to be true in such manner and form as the same are therein set forth and alleged, doth demur to the said bill, and for cause of demurrer, shows that the said complainant has not, in and by her said bill as amended, made or stated such a case as doth or ought to entitle her to any such discovery or relief as is thereby sought, and prayed for, from or against this defendant. And said defendant particularly demurs to that portion of said bill as amended relating to charges of adultery against this defendant as insufficient in law to be answered unto, and by reason of
169 the particulars of time and place and other particulars not being stated in relation to said charges.

Wherefore, and for divers other good causes of demurrer appearing in the said bill as amended and to said part thereof, the defendant doth demur thereto, and he prays the judgment of this honorable court, whether he shall be compelled to make any further or other answer to the said bill as amended and particularly to said charges of adultery; and he humbly prays to be hence dismissed, with his reasonable costs and charges, in this behalf, most wrongfully sustained.

WM. J. AMMEN,
Solicitor for Def't.

And afterwards, to-wit, on the 3rd day of January, A. D. 1893, a certain stipulation was filed in the office of the clerk of said court, in words and figures following to-wit:

Stipulation Filed January 3rd, 1893.

STATE OF ILLINOIS, } ss:
County of Cook, }

Circuit Court, Cook County.

ADELAIDE M. HARDING }
vs. } ss.
GEORGE F. HARDING. }

Petition for Separate Maintenance.

When this suit for separate maintenance began, the plain-
170 tiff had in her hands a large sum of money and property, convertible into money and applicable to her support, received, from me and from my family; and when this shall be expended and applied to her support, for which it was given her, at that time whatever the result of this case, it would be my duty as I understand it, to give her further support; and this I should do whatever the result of this case and, without reference to whether she can exact it or not.

I am confident of making good my defense, if the case must be tried, but the considerations suggested make the fact that the plaintiff may prove to have no real cause of action immaterial.

Hence it seems to me to be wise in the interest of my family and of peace, if I can put an end to this litigation to do so by consenting to a decree giving her for separate maintenance such a sum as the court may find to be just and equitable, after a due consideration of the evidence bearing upon the amount of the allowance. Hence I give my consent that a decree for separate maintenance shall be entered in favor of the plaintiff without a finding or trial of the issue in this case.

That this consent is not collusive is sufficiently shown by the length and character of the litigation. I further offer and stand
171 ready to make such other or further or different stipulation by amendment of the pleadings or otherwise, as may, in the opinion of your honor, be required to make it unnecessary for the court to hear and decide upon the issues and evidence in this case after a long and expensive hearing.

To this end I declare my willingness to stipulate and I do hereby stipulate that the plaintiff, at the time of the commencement of this suit, was living and ever since has been living separate and apart from her husband without her fault, and may take a decree with my consent for such sum as may be reasonable and just for her separate maintenance.

This is the same offer which I have made by way of an attempt at

compromise ever since the commencement of this suit, in which effort a- compromise I have not hesitated to offer double the amount that, in my opinion, should be allowed for her separate maintenance by the court.

GEORGE F. HARDING, *Pro Se.*

WM. J. AMMEN,
Solicitor for D'f't.

And afterwards, to-wit, on the 15th day of November, A. D. 1899, a certain order of supreme court, was filed in the office of the clerk of said court, in words and figures following, to-wit:

172 At a supreme court, begun and held at Springfield, on Tuesday, the sixth day of June, in the year of our Lord, one thousand eight hundred and ninety-nine, within and for the State of Illinois.

Present—James H. Cartwright, chief justice.
Alfred M. Craig, justice.
Jacob W. Wilkin, justice.
Joseph N. Carter, justice.
Benjamin D. Magruder, justice.
Jesse J. Phillips, justice.
Carroll C. Boggs, justice.
Edward C. Aiken attorney general.
Charles M. Woods, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered, that afterwards, to-wit, on the seventeenth day of June, A. D. 1899, the same being one of the days of the term of court aforesaid, the following proceedings were by said court, had and entered of record, to-wit:

ADELAIDE M. HARDING
vs.
GEORGE F. HARDING. } No. 774.

Appeal from Appellate Court of Illinois, First District.

And now, on this day, this cause having been argued by
173 counsel, and the court having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here, that neither in the record and proceedings aforesaid nor in the rendition of the decree aforesaid, is there anything erroneous, vicious or defective, and that in that record there is no error:

It is considered by the court that the decree aforesaid be modified by reducing the amount to be paid the appellee, until the further order of the court, to the sum of three thousand six hundred dollars per annum, to be paid in monthly installments of three hundred dollars. It is also ordered the decree to be rendered in pursuance of the opinion of this court shall provide that such alteration in the allowance for alimony may be made by future decree or decrees as shall or may be found to be just and reasonable, and as so modified, the decree of the circuit court, and the judgment of the appellate court will be affirmed, and the cause will be remanded to the circuit court of Cook county with directions to enter a decree in conformity with the opinion of the court herein.

And it is further considered by the court that the said appellee recover of and from the appellant her costs by her in this behalf expended, and that she have execution therefor.

174 STATE OF ILLINOIS, } ss:
Supreme Court, }

I, Christopher Mamer, elected clerk of the supreme court, in and for the northern grand division of the State of Illinois, and keeper of the records and seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said supreme court in the above entitled cause of record in my office.

In testimony whereof, I have set my hand and affixed the seal of the said supreme court at Springfield, this 9th day of November, A. D. 1899.

CHRISTOPHER MAMER,
[SEAL.] *Clerk of the Supreme Court.*

Endorsed on the wrapper of the above order are the following words and figures, to-wit:

"Gen. No. 79,020. Circuit court Cook county. Adelaide M. Harding *vs.* George F. Harding. Final order of supreme court. Filed Nov. 15, 1899, John A. Cook, clerk. Peck, Miller & Starr, sol'rs for comp."

Heretofore, to-wit, on the 24th day of July, A. D. 1899, a certain mandate from the supreme court was filed in the office of the clerk of said court, in words and figures following to-wit:

175 At a supreme court, begun and held at Springfield, on Tuesday, the sixth day of June, in the year of our Lord one thousand eight hundred and ninety-nine, within and for the State of Illinois.

Present: James H. Cartwright, chief justice.
Alfred M. Craig, justice.
Jacob W. Wilkin, justice.

Joseph N. Carter, justice.
Benjamin D. Magruder, justice.
Jesse J. Phillips, justice.
Carroll C. Boggs, justice.
Edward C. Akin, atterney general.
Charles M. Woods, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered, to-wit, on the seventeenth day of June, A. D. 1899, the same being one of the days of —— the term of court aforesaid, the following proceedings were by said court, had and entered of record, to-wit:

ADELAIDE M. HARDING
vs.
GEORGE F. HARDING. } No. 775.

Appeal from appellate court of Illinois, first district, No. 7765.

And now, on this day, this cause having been argued by
176 counsel, and the court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and that in that record there is no error;

Therefore it is considered by the court, that the judgment aforesaid be affirmed in all things, and stand in full force and effect, notwithstanding the said matters and things therein assigned for error. And it is further considered by the court that the said appellee recover of and from the said appellant her costs by her in this behalf expended, and that she have execution therefor.

I, Christopher Mamer, elected clerk of the supreme court, in and for the northern grand division of the State of Illinois, do hereby certify that the foregoing is a true copy of the final order of the said supreme court in the above entitled cause of record in my office.

In testimony whereof, I have set my hand and affixed the seal of the said supreme court at Springfield, this 9th day of November, A. D. one thousand eight hundred and ninety-nine.

CHRISTOPHER MAMER,
[SEAL.] *Clerk of the Supreme Court.*

177 Endorsed on the back of said order are the following words and figures.

"No 79020. Circuit court of Cook county, in chancery. Harding "vs. Harding, No. 79020. Certified copy of supreme court affirming "order,—affirming decretal order of October 19, 1899. Filed Jul. "24, 1899. John A. Cooke, clerk."

And afterwards, to-wit, on the 1st day of July, A. D. 1890, the following proceedings were had and entered of record in said court, to-wit:

ADELAIDE M. HARDING
vs.
GEORGE F. HARDING. } 79020. Bill.

Now on this day come the parties hereto and by their respective solicitors aforesaid and this cause coming on to be heard upon the petition and motion of the complainant for alimony *pendente lite* and for allowance for the support of the said children, Susan and Madeline, and the court having heard the evidence and the arguments of counsel and being fully advised in the premises,

It is therefore ordered, adjudged and decreed, that the defendant pay to the complainant or to her solicitors the sum of nine hundred dollars within ten days from the entry of the decree, for the
178 support of herself and her said children to July 1st, 1890, and that he pay to complainant or to her solicitors the further sum of three hundred dollars on the first day of each and every month commencing with the first day of July, 1890, for her support during the pendency of this suit.

It is further ordered, adjudged and decreed, that said defendant pay to said complainant or her solicitors within 30 days of the entry of this decree the further sum of one thousand dollars as solicitors' fees, and four hundred dollars for other expenses of her suit.

It is further ordered and decreed, that said defendant pay to said complainant or to her solicitors the sum of one hundred and eighty dollars on the first day of each and every month commencing on the first day of July, 1890, for the support of said children, Susan and Madeline, until the further order of this court provided that this order shall be without prejudice to said defendant to apply at any time hereafter as he may be advised for an order for the custody of said children and this order shall not be construed as a finding that complainant is entitled to such custody.

It is further ordered, adjudged and decreed, that the payment of the foregoing sums of money and each and all of them shall be and is hereby made conditional upon the said complainant join-
179 ing with the said defendant in any conveyance or conveyances of real estate which it may be proper or necessary to make for the purpose of renewing the incumbrances thereon, or of preserving his estate and in case the parties cannot agree as to whether any conveyance is within the purposes aforesaid the matter shall be determined by I. K. Boyesen, master in chancery, to whom this cause is hereby referred for that purpose and the said defendant shall not be excused from making any of the payments aforesaid in the manner and at the times of above specified until said complainant shall be in default by refusing to join in a deed or deeds which the said master shall find after a hearing before him is within the purposes aforesaid.

To all of which the defendant excepted and prayed an appeal to the appellate court of the State of Illinois, first district, which appeal is allowed upon the defendant entering into a bond in the penal sum of four thousand dollars with security to be approved by the court, conditioned as provided by law and it is ordered that twenty days be allowed for filing said bond and certificate of evidence herein.

And afterwards, to-wit, on the 8th day of July, A. D. 1890, the following proceedings were had and entered of record in said court, to-wit:

180 ADELAIDE M. HARDING vs. GEORGE F. HARDING. } No. 79,020. Bill.

Now comes the parties to this suit by their solicitors aforesaid and the cause coming on to be heard upon the motion of the complainant for an allowance to enable her to defend the appeal taken by defendant from the order heretofore entered for temporary alimony, etc., and the court having heard the arguments of counsel and being fully advised in the premises it is ordered that the defendant pay the complainant within thirty days from the entry of this order the sum of three hundred dollars for the purpose aforesaid.

And therefore the defendant prays an appeal from the said order to the appellate court of Illinois in and for the first district which is allowed upon the defendant giving bond in the penal sum of five hundred dollars conditioned according to law and with surety to be approved by the court within twenty days from this date.

It is further ordered that defendant have twenty days in which to file a certificate of evidence herein.

And afterwards, to-wit, on the 23rd day of June, A. D. 1891, the following proceedings were had and entered of record in said court, to-wit:

181 ADELAIDE M. HARDING vs. GEORGE F. HARDING. } 1175. Bill.

Now comes the parties to the above entitled cause by their respective solicitors and the demurrer of the defendant to the bill as amended coming on for hearing it is ordered that the answer heretofore filed in said cause stand as answers to the bill as last amended to all of which the defendant now here excepts and it is further ordered that the defendant have leave and the same is hereby given to file herein an additional answer to amendment to said answer already filed to the said bill as last amended, within ten days from this date.

And afterwards, to-wit, on the 8th day of May, A. D. 1893, the following proceedings were had and entered of record in said court, to-wit:

ADELAIDE M. HARDING
vs.
GEORGE F. HARDING. } 79020. Bill.

On reading and filing mandate of the supreme court it is on motion ordered that the same be and hereby is redocketed in conformity thereto.

182 And afterwards, to-wit, on the 10th day of May, A. D. 1893, the following proceedings were had and entered of record in said court, to-wit:

GEORGE F. HARDING
vs.
ADELAIDE M. HARDING. } 79020. Bill.

This cause coming on to be heard, upon the motion to set the said cause down for hearing and to hear the same, it is ordered that this cause be and the same is referred to Horatio L. Wait one of the masters in chancery of this court to take evidence and report the same with his conclusions herein upon the issue and question as to the amount or amounts if any to be allowed to complainant and to be decreed to be paid by defendant to complainant for alimony support or otherwise herein and upon the other issues herein than the question as to whether complainant at the time of the commencement of this suit was and since that time has been and is living separate and apart from her husband the defendant without her fault, said defendant having admitted from the records herein, and now admitting in open court that the complainant was at the time of the commencement of this suit and since that time has been and is living separate and apart from her said husband without her fault.

And it is further ordered that upon said hearing all competent evidence heretofore taken in this case may be read upon said
183 hearing before the master and other competent evidence may be introduced by either party, and that the said master submit his report herein within fourteen days from and after this date, and that the respective parties have such portions of time respectively within said time so limited for the introduction of evidence and argument as the said master shall prescribe.

And afterwards, to-wit, on the 15th day of April, A. D. 1896, the following proceedings were had and entered of record in said court, to-wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court.

GEORGE F. HARDING }
vs. } Bill.
ADELAIDE M. HARDING. }

Order of April 15, 1896.

This cause coming on to be heard upon the motion to set the said cause down for hearing and to hear the same, it is ordered that this cause be, and the same is referred to Horatio L. Wait, one of the masters in chancery of this court, to take evidence and report the same with his conclusions herein, upon the issue in question
184 as to the amount or amounts, if any, to be allowed complainant, and to be decreed to be paid, by defendant to complainant for alimony, support or otherwise herein, and upon other issues herein than the question as to whether complainant at the time of the commencement of this suit, was, and since that time has been, and is, living separate and apart from her husband, the defendant, without her fault; said defendant having admitted upon the record herein as by his written stipulation filed herein on January 3, 1893, and for the purpose of this trial only, that the complainant was at the time of the commencement of this suit, and since that time has been and is, living separate and apart from her said husband without her fault.

And it is further ordered that upon said hearing, all competent evidence heretofore taken in this cause may be read upon said hearing before the master, and other competent evidence may be introduced by either party, and that the said master submit his report herein within fourteen days from and after this date, and that the respective parties have such portions of time respectively within said time so limited, for the introduction of evidence and argument as the said master shall prescribe. This order is entered *nunc pro tunc* as of May 10, 1893.

And afterwards, to-wit, on the 17th day of July, A. D. 1896, the following proceedings were had and entered of record in said court, to-wit:

185 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court.

GEORGE F. HARDING }
vs } Bill.
ADELAIDE M. HARDING. }

Order of July 17, 1896.

This cause coming on to be heard on the motion of complainant that the court order that the report of Hon. H. L. Wait, master in chancery of this court, to whom this case was heretofore referred, be returned into court forthwith, and on the other motions and petitions of the parties herein, and both parties being present in court by their counsel, and the said master in chancery being present in court and consenting thereto, and the court having heard the said motions and petitions and the arguments of counsel and the evidence and proofs adduced and being advised in the premises, doth here now order that said master in chancery do forthwith return his report of evidence in said cause offered before him including all exhibits, and of his findings and conclusions in said cause and of the objections and exceptions thereto, and the motions made before him and his objections to this court, and file the same with the clerk of this court.

And it is further ordered that the question of the amount
186 of the fees of said master for his services in taking the evidence in said cause and making his report herein and the question of the amount of the solicitors' fees of the solicitors, and all other questions involved in said motions or petitions for complainant herein be, and all other questions and issues in said cause, and each of them, are hereby reserved for the future order of the court; and said parties are hereby allowed to October 1, 1896, in which to present certificates of evidence herein, as to the proceedings of the present term of this court in said cause.

And it is further ordered that the cause be, and the same is hereby set for final hearing on September 10, 1896, on the report of such master and exception of the parties thereto, and on all other questions or issues, if any, in said case.

And afterwards, to-wit, on the 26th day of July, A. D. 1897, the following proceedings were had and entered of record in said court, to-wit:

ADELAIDE M. HARDING, Complainant,
vs.
GEORGE F. HARDING, Defendant.
} Gen. No. 79,020, Term No. —.

This cause having heretofore at the September and Octo-
187 ber terms 1896, of this court, come on to be heard upon the bill of complaint as amended herein, the answer as amended of the defendant thereto, the replication of the complainant to such answer, and the petitions and application of complainant for the custody of children, and upon the report of Horatio L. Wait, master in chancery of this court, filed herein on the 22nd day of September, 1896, under and in pursuance of the order of reference to him theretofore entered herein, and upon the evidence referred to in the report of said master and upon which the said hearing before him on said reference was had; and the court having at the close of the said hearing taken said cause under advisement; and this cause also having come on to be heard at the January term, 1897, of this honorable court, and said cause being under advisement as aforesaid, upon the objections and application of the complainant for an allowance of solicitors' fees to the complainant and against the defendant herein, and for the allowance to the complainant and against the defendant for expenses of prosecutiong her suit, and upon the petition of the defendant theretofore, on January 22nd, 1897, filed herein, and the complainant's answer thereto filed February 4th, 1897, and upon the proofs and evidence taken and heard in open court upon said hearing last mentioned; and the court having heard the argument of counsel and having thereupon taken the said cause under advisement:

188 And the court having now considered and being duly advised in the premises, doth find that the allegations of the said bill of complaint as amended are true; and that the said complainant, at the time of the commencement of this suit, was living, and ever since that time has lived and is now living separate and apart from her husband, the said defendant, without her fault; and that the equities of this cause are with the complainant.

And the court doth further find and adjudge that the findings and conclusions of the said master in chancery, Horatio L. Wait, in his said report contained, are correct and that the exceptions of each of the parties thereto are not well taken, and that such exceptions and each of them be and the same are overruled. But the court doth further find that since the taking of the proofs and evidence before said master was concluded and since the said hearing herein upon the exceptions to the said report of the said master at the September and October terms of this court, a change has so taken place in the value of property and the circumstances of the defendant, in that the rental value of the property of the defendant has been temporarily depressed and reduced and the amount of the defendant's in-

come therefrom temporarily reduced, in the opinion of the court, and that the allowance fixed by the master should be reduced to the amounts hereinafter specified:

189 It is therefore ordered, adjudged and decreed by the court that the complainant is entitled to an allowance from defendant for her reasonable support and maintenance while they, the said complainant and the said defendant have so lived separate and apart, and while they do so live separate and apart; and that having reference to the condition of the parties in life, and the circumstances of this case, the said complainant be allowed and that the defendant do pay to the complainant, the sum of six thousand and four hundred dollars ($6,400) per year from the date of the entry of this decree (this decree being without prejudice to such order of July 1st, A. D. 1890, as to the amount so unpaid thereunder) and that the defendant do pay to the complainant as and for such allowance for her separate maintenance hereby made accruing from and after the entry of this decree the said sum of six thousand four hundred dollars ($6,400) a year from and after the date of the entry of this decree until the further order of the court, and that the said sum of six thousand, four hundred dollars ($6,400) from and after the entry of this decree, be paid in monthly installments of five hundred thirty-three and one-third dollars ($533⅓) per month, payable in advance, on the 26th day of each and every month commencing on the 26th day of July, 1897, until the further order of the court.

And the court doth further find that the said complainant has supported the daughters of the complainant and defendant,

190 Susan Grace Harding and Madeline Harding, from the date of the filing of the bill of complaint herein until the said daughters respectively arrived at the age of eighteen years; that the said Susan Grace Harding became eighteen years of age on the 12th day of December, 1892, and the said Madeline Harding became 18 years of age on the 18th day of November, 1896; and the court doth find, order, adjudge and decree that the complainant have, and she is hereby awarded, the custody of the said daughters from the date of the filing of the bill of complaint herein; and that the defendant do pay to the complainant, within twenty days from the date of the entry of this decree the sum of two hundred dollars ($200) per month for each and every month from the date of the filing of the bill of complaint herein until the 12th day of December, 1892, as and for the maintenance of the said two daughters until said last mentioned date, and the sum of one hundred dollars ($100) per month from the said 12th day of December, 1892, until the 18th day of November, 1896, as and for the support and maintenance of the said Madeline Harding between said two dates last mentioned, the said sums amounting in the aggregate to the sum of eight thousand one hundred fifty-six dollars and sixty-one cents ($8,156.61).

And it is further ordered, adjudged and decreed that the defendant do also pay to the complainant or her solicitors, John S. Miller

and Merritt Starr, as solicitors' fees herein of the said solicit-
191 ors last mentioned, the sum of eight thousand dollars ($8,000) within twenty days from this date.

And the court doth further order, adjudge and decree that the defendant do also pay to the complainant within twenty days from the date of the entry of this decree, the further sum of nine hundred and ninety-six and fourty-seven hundredths dollars which she has paid or incurred to enable her to prosecute this suit in excess of the sum heretofore allowed to her therefor and which is allowed to her for that purpose.

And it is further ordered that the defendant do pay the costs of this suit to be herein taxed.

And it is further ordered, adjudged and decreed that this decree be made a lien on the real estate of the defendant and in case of default in the payment of the said installments of money as the same become due or the costs herein, that execution issue thereon; and it is ordered that either party be at liberty to apply to the court as circumstances may require.

And it is further ordered, and decreed that the petition and motion of defendant to reduce or modify, or suspend or release or discharge the defendant from payment of the allowance made for temporary alimony by the decretal order entered herein on the first day of July, 1890, or to modify or affect said order last mentioned, be, and the same is, denied; and that this decree is without prejudice to the said decretal order of July 1, 1890, as to the amounts of money
192 which have accrued or become payable to the complainant thereunder at the time of the entry of this decree.

And the said defendant objects and excepts to the foregoing decree, and to every finding and every portion thereof, severally, and prays an appeal therefrom to the appellate court in and for the first district of Illinois, which appeal is hereby allowed, and twenty days is hereby given said defendant in which to file an appeal bond in the sum of $5,000.00, with security to be approved by the clerk of this court.

And by agreement of the parties to this cause said defendant and complainant are each hereby allowed sixty days from this date within which to present a certificate of evidence as to the evidence and proceedings of, in, during or subsequent to the January term, 1897, of this court in said cause.

And afterwards, to-wit, on the 8th day of December, A. D. 1899, the following proceedings were had and entered of record in said court, to-wit:

November Term. In Chancery.

ADELAIDE M. HARDING
vs.
GEORGE F. HARDING. } 79,020. Bill.

DECEMBER 8TH, A. D. 1899.

193 This day come again the parties hereto by their solicitors respectively; and this cause coming on to be heard on the final order of the supreme court of Illinois in said cause, entered on the seventeenth day of June, A. D. 1899, a duly certified copy of which was, pursuant to the statute in such case made and provided, duly filed herein in the office of the clerk of this court on the fifteenth day of November, A. D. 1899; and upon the motion of complainant herein by her solicitors here now made in open court on due notice to the defendant, that the court here now enter its decree modifying the decree heretofore entered herein on the twenty-sixth day of July, A. D. 1897, in conformity with the said order of said supreme court of Illinois; and this court having heard said motion and having inspected said duly certified copy of the order of said supreme court of Illinois, and having heard arguments of counsel and being advised in the premises, doth here now order, adjudge and decree that in conformity with said order and said mandate of said supreme court said final decree heretofore entered herein on the twenty-sixth day of July, A. D. 1897, be and the same is hereby modified by reducing the amount provided by said decree of July 26, 1897, to be paid thereunder by the defendant to the complainant from the sum of six thousand four hundred dollars ($6,400) per year in said decree of July 26, 1897, mentioned, to the sum of three thousand six hundred dollars ($3,600) per annum, to be paid in monthly installments of three hundred dollars each, and that
194 for that purpose the words "three thousand six hundred dollars ($3,600)" be and the same are substituted in the said decree of July 26, 1897, in lieu and stead of the words "six thousand four hundred dollars ($6,400)" where the same occur, and that the words three hundred dollars ($300)" be and the same are substituted in the said decree of July 26, 1897, in lieu and stead of the words "five hundred and thirty-seven and one-third dollars ($53⅓)" where the same occur.

And the court doth further order, adjudge and decree that such alteration of this decree in the allowance of alimony may be made by future decree or decrees as shall or may be found to be just and reasonable.

And the court here now further orders, adjudges and decrees that said decree of this court entered on said July 26th, 1897, so far as not inconsistent herewith, and that said decree of July 26, 1897, as so modified, stands in full force; and that the same be obeyed by the parties hereto.

And it is further ordered that the petition heretofore filed by complainant for additional allowances, being for solicitors' fees, etc., since the entry of said decree of July 26, 1897, be reserved and be and is set down for hearing on the 3d day of January, 1900, at ten o'clock a. m ; and said defendant is ruled to answer said petition within ten days from this date.

195 UNITED STATES OF AMERICA :

STATE OF ILLINOIS, } ss :
County of Cook, }

I, John A. Cooke, clerk of the circuit court of Cook county, in the State aforesaid, do hereby certify that I am the keeper of the records and files of said court, and that the above and foregoing is a true, perfect and complete transcript of the record per præcipe filed in my office on the 8th day of January, 1901, in *an* certain cause lately pending in said court, on the chancery side thereof, between Adelaide M. Harding, complainant, and George F. Harding, defendant.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at Chicago, in said county, this 9th day of January, A. D. 1891.

[SEAL.] JOHN A. COOKE, *Clerk.*

STATE OF ILLINOIS, } ss :
County of Cook, }

I, Abner Smith, chief justice of the circuit court of Cook county, in the State of Illinois, hereby certify that John A. Cooke, who signed the above certificate, was at the time of signing the same, and is now, clerk of the said circuit court of Cook county, duly commissioned and qualified ; that said court is a court of record,
196 having a clerk and seal ; that said attestation is in due form and by the proper officer, according to the laws of the State of Illinois, and that the above signature of said clerk is genuine.

Witness my hand and seal at Chicago, in said county of Cook, this 9th day of January, A. D. 1901.

[SEAL.] ABNER SMITH,
Chief Justice of the Circuit Court of Cook County.

UNITED STATES OF AMERICA :

STATE OF ILLINOIS, } ss :
County of Cook, }

I, John A. Cooke, clerk of the circuit court of Cook county, in the State of Illinois (said court being a court of record), do hereby certify that the Honorable Abner Smith, whose name is subscribed to

the annexed and foregoing certificate was, at the time of the signing thereof, and now is, one of the judges of said circuit court, duly elected, commissioned and qualified, and that his said signature is genuine.

In witness whereof, I have signed my name and affixed the seal of said circuit court, at my office, in the city of Chicago, in said Cook county, this 9th day of January, 1901.

[SEAL.] JOHN A. COOKE, *Clerk.*

197–324 Mr. WORKS: Under the stipulation I offer in evidence the testimony of the defendant taken in the Illinois case.

My husband and I lived together as husband and wife until about the 10th of October, 1888.

Q. Has there been to your knowledge, any misconduct as his wife?

A. No, sir; never. From 1872 to February 1, 1890, we lived at 2536 Indiana avenue; previous to that on same near 18th street; the home, No. 2536 was in every way comfortable.

* * * * * * *

325–381 Mr. WORKS: I offer in evidence the testimony of Miss Adelaide Harding, a daughter of the plaintiff and defendant, as taken in the Illinois court, under the stipulation which has been filed here.

ADELAIDE HARDING, a witness on behalf of defendant, testified as follows:

* * * * * * *

382–427 Mr. WORKS: I offer in evidence the testimony of Miss Susie Harding in the Illinois case, under the stipulation here.

SUSIE HARDING, a witness on behalf of the defendant testified:

428–433 Under the stipulation we offer in evidence the deposition of Katie Coughlin taken in the Illinois case.

Deposition of KATIE COUGHLIN, February 7, 1891, taken for defendant.

* * * * * * *

434–444 Mr. WORKS: Under the stipulation, we offer the deposition of Maggie Galvin in the Illinois case.

Deposition of MAGGIE GALVIN, on behalf of defendant, January 24, 1891.

* * * * * * *

445–450 Mr. WORKS: Under the stipulation, we offer the deposition of Anna Galvin taken in the Illinois case.

Deposition of ANNA GALVIN, January 24, 1891, for defendant.

* * * * * * *

451 Mr. WORKS: Under the stipulation, we offer the deposition of George W. Brayton, taken in the Illinois case.

Deposition of GEORGE W. BRAYTON, for defendant, taken October 4, 1890.

* * * * * * *

452–455 Mr. WORKS: Under the stipulation, we offer the testimony of J. J. Thiesen in the Illinois case.

J. J. THIESEN, witness for defendant, testified, December 3, 1890:

* * * * * * *

456 Mr. WORKS: Under the stipulation, we offer the testimony of Edward Iverson in the Illinois case, taken December 3rd, 1890.

457 EDWARD IVERSON, for defendant testified:

* * * * * * *

Mr. WORKS: I offer now the testimony of Edward Iverson in the Illinois case, recalled for defendant, December 13, 1890.

458 EDWARD IVERSON, recalled for defendant:

* * * * * * *

459–461 We offer the testimony of William Reed, taken December 3rd, 1890, in the Illinois case. It is offered under the stipulation.

WILLIAM REED, for defendant, testified as follows:

* * * * * * *

462–464 Mr. WORKS: I offer the further testimony of this same witness in the Illinois case, under the stipulation.

WILLIAM REED, for defendant, testified, February 2, 1892:

* * * * * * *

465–467 Mr. WORKS: Under the stipulation, we offer the evidence of Clara Estelle Taylor in the Illinois case, taken December 6th, 1890.

CLARA ESTELLA TAYLOR, witness for defendant, testified:

* * * * * * *

468 Mr. WORKS: Under the stipulation, I offer the testimony of Catherine Wren, taken in the Illinois case, December 6, 1890.

CATHERINE WREN, witness for defendant, testified:

* * * * * * *

469–471 Mr. WORKS: Under the stipulation, we offer the testimony of Arthur C. Blayney, taken December 10, 1890, in the Illinois case.

ARTHUR C. BLAYNEY, witness for defendant, testified:

* * * * * * *

472–475 Mr. WORKS: Under the stipulation, I offer the testimony of William A. McLean, taken in the Illinois case December 10, 1890.

WILLIAM A. MCLEAN, for defendant testified:

* * * * * * *

476 Mr. WORKS: Under the stipulation, I offer the testimony of Benjamin Thompson, in the Illinois case, taken Decem-
477–481 ber 13th, 1890.

BENJAMIN THOMPSON, witness for defendant testified:

* * * * * * *

Mr. WORKS: Under the stipulation, I offer the testimony of Charles B. Wright in the Illinois case.

CHARLES B. WRIGHT, for defendant, testified:

* * * * * * *

482 Mr. WORKS: Under the stipulation, I offer the testimony of Edward P. Harris in the Illinois case.

EDWARD P. HARRIS, for defendant, testified:

* * * * * * *

483 & 484 Mr. WORKS: Under the stipulation, I offer the testimony of R. W. Iverson, in the Illinois case.

R. W. IVERSON, a witness for defendant, testified:

* * * * * * *

485 Mr. WORKS: Under the stipulation, I offer the testimony of Benjamin Thompson, recalled in the Illinois case.

BENJAMIN THOMPSON, recalled for defendant:

* * * * * * *

Mr. WORKS: Under the stipulation I offer the testimony of William A. Root, in the Illinois case.

486 WILLIAM A. ROOT, a witness for defendant, testified:

* * * * * * *

Mr. WORKS: Under the stipulation, I offer the testimony of Elias R. Bowen, in the Illinois case.

ELIAS R. BOWEN, a witness for defendant, testified:

* * * * * * *

487 & 488 Mr. WORKS: Under stipulation, we offer the testimony of Robert Boyd, in the Illinois case, taken January 31, 1891.

ROBERT BOYD, for defendant, testified:

* * * * * * *

489–491 Mr. WORKS: Under the stipulation, I offer the deposition of Ellen Finter, taken in London, in the Illinois case.

ELLEN FINTER, for defendant, testified:

* * * * * * *

492–494 Mr. WORKS: Under the stipulation I offer the deposition of Clement Le Seur in the Illinois case.

CLEMENT LE SEUR, a witness for defendant, testified:

* * * * * * *

495 Mr. WORKS: Under the stipulation I offer the deposition of Ellen Le Seur, taken in the Illinois case.

ELLEN LE SEUR, a witness for defendant, testified:

* * * * * * *

496 & 497 Mr. WORKS: Under the stipulation we offer the testimony of Alfred P. Wright, in the Illinois case, taken June 18th, 1891.

ALFRED P. WRIGHT, a witness for defendant, testified:

* * * * * * *

498 Mr. WORKS: Under the stipulation I offer the deposition of William O. Cutter, in the Illinios case, taken June 19th, 1891.

WM. O. CUTTER, a witness for defendant, testified:

* * * * * * *

499 Mr. WORKS: Under the stipulation I offer the deposition of Laura Hammond, in the Illinois case, taken June 19, 1891.

LAURA HAMMOND, a witness for defendant, testified:

* * * * * * *

500 & 501 Mr. WORKS: Under the stipulation we offer the deposition of Frank L. Union, in the Illinois case, taken August 14th, 1891.

FRANK L. UNION, a witness for defendant, testified:

* * * * * * *

502 Mr. WORKS: Under the stipulation we offer the deposition of Harriet Union in the Illinois case, taken August 14th, 1891.

HARRIET UNION, a witness for defendant, testified:

* * * * * * *

503 & 504 Mr. WORKS: Under the stipulation we offer in evidence the deposition of Mrs. Morse, taken in the Illinois case.

Mrs. MORSE, a witness for defendant, testified:

* * * * * * *

505–520 VICTOR M. HARDING, a witness for defendant, testified:

* * * * * * *

521 It was in that conversation we discussed this divorce suit, and I said I thought there was nothing to prevent his bringing such a suit in every State in this Union as fast as he could gain domicile in the different States, and cause us untold
522–529 annoyance. He said he certainly would; he would go into every State in the Union, if necessary, to get a divorce.

* * * * * * *

530 I have seen my father in Chicago since the 15th day of May, 1895, as often as I have seen him in previous years there. It is pretty often; every few days sometimes for weeks at a time. I have seen him not every day, but on the street here and there and sometimes at the club, sometimes at his office with more or less frequency. The last year or eighteen months I have not seen him as often as before that.

Q. In reference to the period from May 15th, 1895, until August 1st, 1897, or thereabouts, did you see him frequently in Chicago during that period?

A. Yes, I am positive I saw him frequently because his checks were frequently drawn out of the bank, and I had occasion to refer to him and my brother in reference to them. He occupied
531 an office in Chicago and does to this day. There has never been a period that that office was closed to my knowledge; in fact I knew it has been open because I have had occasion to go there frequently on business.

Q. You say you have frequently found him there?

A. Not at his office latterly. I should say the last two or three years he has not been in his office as much as previously.

Q. I am asking you more particularly in reference to the period between May 15th, 1895, and August 31st, 1897?

A. I should say that there had been no change up to 1898, that since then my father has not been at his office so much, but more at the club and at his home. Sometimes I am told he does not go down town at all.

Q. You think from May 15, 1895, to August 31, 1897, he was about his office with as great frequency as he had been in previous years.

A. Yes, I should say there had been no change.

Q. With what frequency did you see him during the period from

May 15th, 1895, to August 31, 1897, at the old home place, 2536 Indiana avenue?

A. I should say I had seen him off and on an average of several times a week; sometimes for periods of months, two or three months; then I would not see him for months, possibly, and then I would see him again every day, possibly for a week, either down town or at his office. I do not think I have seen him at the house there perhaps more than half as often as I have seen him down town dur-
532–588 ing that period, but I have had occasion; I go down on Indiana avenue and the cars go right along in front of the house; when he is in the front of the house you can see from the front platform of the car where I usually ride—I can see him read his newspaper in bed; he always takes his breakfast in bed. It has been a matter of comment with my sisters and myself that you can see papa, any morning going down town, up in his front room. That is the way I saw him; his blinds are open and he sits in bed reading with his morning robe around him.

* * * * * * *

589 Mr. WORKS: We rest.

Mr. PUTERBAUGH: Under the stipulation we offer in behalf
590 of the plaintiff the certificate of evidence in the case of Adelaide M. Harding against George F. Harding as shown in the record of the Illinois case.

Certificate of Evidence.

Be it remembered that at the January term, A. D. 1897, of this court, the above entitled cause came on for hearing, as stated by the final decree of this court in said cause, duly entered of record herein under date of July 25, 1897, before the Hon. Richard W. Clifford, one of the judges of said court in chancery sitting, and thereupon the said court announced that new evidence would be received upon a hearing in open court in support of and against the several petitions and motions referred to in the said decree.

And thereupon, at such hearing, beginning on January 22, 1897, Mr. John S. Miller and Merritt Starr appearing for the complainant, and Mr. S. P. Shope and Wm. J. Ammen for the defendant, the following evidence was offered and following proceedings had:

* * * * * * *

And the foregoing was all the evidence offered by either party or considered by the court in said cause, and thereupon the court entered its decree in said cause, as appears of record under date of July 26, 1897, to all of which, and every part thereof, said defendant then and there excepted; and in settling the terms of said decree, the attorney for the complainant requested the court to find in such decree that the allegations in the said bill of complaint, as
591 amended herein are true; but the defendant objected to such finding on the ground of the paper filed herein January 3,

1893, and presented to the court by the defendant, and the contents thereof, and on the further ground that such finding was not warranted by the proof; and the court stated that it, the court, had not considered or passed on that question, for it, the court, regarded it as unnecessary, in view of the said paper of defendant, filed herein January 3, 1893; and thereupon such finding was not inserted in such decree.

And inasmuch as the forgoing matters and things do not otherwise appear of record in said cause, the said defendant presents this, his certificate of evidence, and asks that the same may be signed, sealed and filed, and made a part of the record in said cause; which is accordingly done on this 24th day of September, A. D. 1897, as of the 26th day of July, A. D. 1897.

(Signed) RICHARD W. CLIFFORD, [SEAL.]
Judge of said Circuit Court, Cook County.

It is admitted by the defendant, appearing by his counsel Works & Works, that the whole certificate of evidence was offered in evidence, but that the above portion of the certificate of evidence is all that is material to the matters therein referred to and to save costs that portion only of said certificate of evidence is copied into
592 the record, the plaintiff consenting thereto under the admission above made by the attorneys for the defendant.

Mr. WORKS: We object to the offer of the certificate of evidence as incompetent, irrelevant and immaterial, but our objection does not extend to giving a part of the certificate in place of the whole as already admitted.

The COURT: The objection will be overruled.

Mr. WORKS: We except.

Mr. PUTERBAUGH: Under the stipulation we offer the following portion of the Illinois record:

Motion of defendant filed May 13, 1893, "to modify the order of reference entered in the above entitled cause, on May 10, 1892, by striking out the recital therein as to admissions on the part of defendant, as contrary to the facts, and for the reason that the only admissions ever made by defendant in said cause are those made by the statement signed by him and filed in said cause on January 3d, 1893, and for other reasons, and defendant moves the court to otherwise modify said order of reference."

Mr. WORKS: Objected to as incompetent, irrelevant and immaterial.

593 The COURT: Objection overruled.

Mr. WORKS: Exception.

Mr. PUTERBAUGH: Under the stipulation we offer the following portion of the Illinois record:

Order May 13, 1893, "that the motion of defendant to modify order of reference entered on May 10, 1893, be, and hereby is entered and continued."

Mr. WORKS: We object to that on the same grounds.
The COURT: Objection overruled.
Mr. WORKS: Exception.

Under the stipulation we offer in evidence the deposition of Mrs. A. R. Von Louis in the Illinois case.

Mrs. A. R. VON LOUIS, a witness for plaintiff, testified:

* * * * * * *

594–654 Mr. PUTERBAUGH: Under the stipulation, I offer in evidence the deposition of Abner C. Harding in the Illinois case.

ABNER C. HARDING, a witness on behalf of plaintiff, testified as follows:

* * * * * * *

655 Mr. PUTERBAUGH: Under the stipulation we offer in
656–723 evidence the deposition of George F. Harding, Jr., in the Illinois case.

GEORGE F. HARDING, JR., a witness for plaintiff, testified:

* * * * * * *

724–778 Mr. PUTERBAUGH: Under the stipulation we now offer the evidence of Beatrice Harding in the Illinois case.

BEATRICE HARDING, a witness in behalf of plaintiff, testified as follows:

779–824 Mr. PUTERBAUGH: We now offer the testimony of Amelia Niederland in the Illinois case, under the stipulation.

* * * * * * *

AMELIA NIEDERLAND, a witness on behalf of plaintiff testified as follows:

* * * * * * *

825–978 Mr. PUTERBAUGH: Under the stipulation we offer in evidence the deposition of the plaintiff, in the Illinois case.

Plaintiff testified as follows:
The defendant and myself lived together as husband and wife until say about October, 1888, or within ten days of that period. We lived in the same house up to February 1st, 1890.

* * * * * * *

979 Q. What was your Chicago office, and who was in charge since May, 1895?

A. It was a realty office, in charge of my realty, and conducted and in charge of my son exclusively; I was in my office in Chicago after the month of May, 1895, very little—taking no part in the business and only there when litigation or something of that kind compelled my attendance in Chicago.

Q. State what was done at your office in Chicago since 1895, May of 1895, relative to your declaring your residence to be in the city of San Diego?

Mr. WORKS: I object to that as incompetent, irrelevant and immaterial and not rebuttal, and as asking for the conclusion of the witness.

WITNESS: The house was practically closed.

* * * * * * *

980 Q. Is there anything further that you have not stated as to what you did in relation to your residence being in San Diego, California, either at the house or office after the month of May, 1895?

Mr. WORKS: Objected to as incompetent, irrelevant and immaterial.

Objection overruled and exception taken.

A. I am unable to state what I did, more than declarations and notices, and the fact that I was not in the house but a very small portion of the time when I was in the city; slept occasionally in one room, the rest of the time it was closed up, a long time.

* * * * * * *

981–997 Q. You may state whether it is true or not that there was—as stated by Victor M. Harding, a man servant or coachman employed or kept at 2536 Indiana avenue in December last, or at any time since December last?

A. There has not been a man servant employed in that house in five years. The stable was burned out five years ago and has never been restored. The statement of Victor Harding touching it is utterly untrue.

* * * * * * *

998–1000 Q. I believe you stated in your testimony, Mr. Harding that the Paris furniture you had sold to a Mr. Sanders?

A. I did. That sale was consummated on this side of the water, after I returned. Mr. Sanders was Mrs. Von Louis' step-father. Mr. Saunders' deposition or testimony was not taken in the Illinois case. I have not produced him as a witness here, nor his deposition. I would like to explain why. The testimony abruptly stopped with my stipulation of January, 1893, and after that we ceased to desire testimony on the subject of adultery, and that the charges of cruelty were unnecessary—testimony upon that was unnecessary, but put in some and some as to other matters, bearing on—whatever it might be—tickets, furniture, but not immediately though, but that was for greater caution, lest we might be examined—the other side, we expected them to put in proof upon all the issues which had—that were at issue and that were sustained by the supreme court.

In making my explanation I have been referring to the suit for maintenance brought in Illinois in February, 1900.

* * * * * * *

1001 Q. Was her deposition ever taken for use in the Illinois case, or in this case, and was her testimony ever used in either?

A. No, we never got to the taking of our testimony in that case except the testimony of Mrs. Louis—we never got any further on the question of adultery. We got through with Mrs. Louis' testimony. We took hers.

Q. At about this stage then, when the testimony on this adultery issue had been produced from the other side you made this statement which has been introduced in evidence here as a part of the record in the Illinois court?

A. No, it was January 3rd, 1893, and their testimony had been taken in 1890 and early in 1891, I think. There was a lapse of a year or two in the taking of the testimony; and a stipulation was made and we found it unimportant to take it, just as the stipulation states; I stand by that stipulation.

* * * * * * *

1002–1011 WITNESS: I claim San Diego to be my residence up to the present hour, and have claimed that since 1895, May of that year.

* * * * * * *

1012 And this was all the evidence offered in said cause.

1013 *Specifications in Which the Findings Are Not Supported by the Evidence.*

1. The first finding of fact is not justified by the evidence in that the evidence fails to show that plaintiff and defendant cohabited as husband and wife until about the first day of February, 1890, and the evidence does show on the contrary that they did not cohabit as such husband and wife after October, 1888; and the evidence further shows that in said October, 1888, the plaintiff deserted the bed of defendant and did not thereafter cohabit with her.

2. The second finding of fact is not justified by the evidence in that the evidence fails to show that the plaintiff is a *bona fide* resident of the county of San Diego, State of California, or that he has been such resident since the 15th of May, 1895, or that he has at all been such resident; but on the contrary the evidence shows that the plaintiff is not now and that he never has been a *bona fide* resident of the State of California.

3. The second finding of fact is further not justified by the evidence in that the evidence fails to show that plaintiff has been a resident of the State of California for more than one year and of said

county of San Diego for more than three months immediately preceding the commencement of this action and the filing of
1014 the complaint herein; but, on the contrary, the evidence shows that the plaintiff is not now and that he never has been a *bona fide* resident of either the county of San Diego, or State of California.

4. The third finding of fact is not justified by the evidence in that the evidence fails to show that on or about the first day of February, 1890, the defendant disregarding the solemnity of her marriage vow did wilfully or without just cause or at all, desert and abandon, or desert or abandon the plaintiff; but, on the contrary, the evidence shows that the defendant did not desert or abandon the plaintiff as set forth in said finding on the 1st day of February, 1890, or at any other time, or at all.

5. The said third finding of fact is further not justified by the evidence in that the evidence fails to show that ever since the first day of February, 1890, defendant has and continues to, or has or continues to, wilfully and without just cause, or wilfully or without just cause, or at all, desert and abandon, or desert or abandon plaintiff, and to live separate and apart from him without any sufficient cause or reason, and against his will and without his consent; but on the contrary the evidence does show that the defendant never did desert or abandon the plaintiff; and the evidence further shows that in living separate and apart from the plaintiff she did so with good and sufficient cause and reason, and not otherwise.

1015 6. The fourth finding is not sustained by the evidence in that the evidence fails to show that all the allegations in the complaint are true, but that it shows that many of such allegations are untrue; nor does the evidence show that all the allegations, averments and denials in the pleadings of the defendant in conflict with the allegations in said complaint are untrue; but on the other hand the evidence substantiated and proved many of said allegations.

7. The evidence shows that by a decree of the court of last resort of the State of Illinois in an action between the plaintiff and defendant, in which said action the defendant herein was plaintiff and the plaintiff herein was defendant, the cause of action attempted to be set forth in the complaint herein was adjudicated between said parties, there being no other parties to said action in Illinois; that said judgment or decree was rendered in an action brought by defendant herein for separate maintenance under a statute of said State of Illinois, and said court of last resort of said State of Illinois decided that the defendant herein was living separate and apart from the plaintiff herein after the said alleged desertion complained of in the complaint without any fault or wrong on her part; that said decision of said court of last resort of Illinois, is and has been for several years, and long prior to the trial of this action, binding between the said parties, in full force and effect, unreversed, and that there is no power of appeal from the same.

1016 *Specifications of Error.*

Defendant specifies the following particular errors in law occurring at the trial and excepted to by her.

1. The court erred in ordering and rendering judgment in favor of plaintiff.

2. The court erred in each of its conclusions of law.

3. The court erred in its first conclusion of law.

4. The court erred in its second conclusion of law.

4. The court erred in overruling the objection of the defendant to the introduction of any evidence in said action, which said objection was made on the ground that the alleged cause of action set forth in the complaint was and is barred by the provisions of subdivision 3 of section 124 of the Civil Code of the State of California, and in permitting the introduction of such evidence.

6. The court erred in sustaining the objection of plaintiff to the following question propounded plaintiff by defendant's counsel when plaintiff was on the witness stand, to-wit: Q. I wish you would state to the court in a few words the general tenor of the offer you made? said question having been with reference to a certain business

1017 offer said to have been made by plaintiff to the mayor and common council of the city of Chicago.

7. The court erred in overruling the objection of the defendant to the following question asked the witness Van Meter: "Mr. Van Meter, did you present this deed to Mrs. Harding?" and in permitting said question to be answered.

8. The court erred in overruling the objection of the defendant to the following question asked the witness Amelia Neiderland: "Did you ever see Mr. Harding angry in the house?" and in permitting said question to be answered.

9. The court erred in overruling the objection of the defendant to the following question asked the witness Amelia Neiderland: "During all the time that you were in the house Mr. Harding never got mad or got angry or scolded?" and in permitting the witness to answer said question.

10. The court erred in permitting the witness George F. Harding, Junior, to testify to certain articles which were alleged to have been taken from the house 2536 Indiana avenue in the city of Chicago, when defendant left there in February, 1890.

11. The court erred in allowing the witness Beatrice Harding to testify that defendant took certain articles from the house in Chicago when she left there February 1, 1890.

1018 12. The court erred in admitting in evidence the correspondence between Lucius J. Henderson and the defendant, and erred in overruling the objections of the defendant to the admissibility thereof, and to each of the letters in said correspondence.

13. The court erred in sustaining the objection of plaintiff to the evidence of Kate Coughlin offered to show the intimacy existing between the plaintiff and Mrs. Von Louis and erred in striking out said testimony.

14. The court erred in excluding evidence offered by the defendant to prove by family declarations and general family knowledge that Mrs. Von Louis was not a relative of Mr. Harding.

15. The court erred in denying motion of defendant to strike out that portion of the testimony of the witness Van Meter referring to the presentation by him of a certain deed to Mrs. Harding for her signature and detailing the conversation which took place between said Van Meter and Victor Harding and between the said Van Meter and defendant.

16. The court erred in permitting the introduction of testimony by the plaintiff in his examination of witnesses in chief and in his opening case, tending to show the conduct and acts of the plaintiff and the defendant toward each other, and tending to show the condition of affairs of the household of the plaintiff and defendant prior to the period of the alleged desertion, and erred in over-
1019 ruling the objections of the defendant to such testimony, and erred in denying motions of defendant to strike out such testimony when given.

17. The court erred in sustaining the following objection of the plaintiff to a portion of the testimony of the defendant: "We object to that portion of the testimony just read, beginning, 'I went to Onset that summer' and ending, 'I did not go to the other hotels at Onset that year,' on the ground that it is not the best evidence and hearsay, and also giving the opinion of the witness as to the book or whatever she saw there being a register."

18. The court erred in overruling the objection of the defendant to the question asked the defendant, "Did you ask him to employ detectives," and in permitting said question to be answered.

19. The court erred in sustaining the motion of the plaintiff to strike out the following portion of the testimony of the witness Katie Coughlin: "So when I went away she said she was anxious for it to happen, said she hoped it would be a boy, said her uncle said he would settle any of his houses and lots on him if it be a boy. The next time I came she said 'I don't think it will be long now.' She was anxious to have it over because she was going away as soon as it was. She asked me to go abroad with her."

20. The court erred in sustaining the motion of the plaintiff to strike out that portion of the testimony of the witness Katie
1020 Coughlin as follows: "Said 'uncle gave her $50 a week.' She said he was very wealthy."

21. The court erred in sustaining plaintiff's motion to strike out the following portion of the testimony of the witness Anna Galvin as follows: "colors; after we went down to 31st street we made a 'gray one for her; that was going out of mourning. After Men-'tone, I saw her once on 31st street and then walking on Michigan

"avenue. I think two years ago, stopped and spoke with us and "asked us to come and see her; it was up near 32nd. where she "lived. We liked her very much, she was always so sweet and "nice; she was a lovely lady; she seemed very nice to us. She al- "ways paid her bills. I never saw her spend any money. She lived "very nicely. The work at our shop in the summer was probably "in June, 1888, right after that in winter. Knew her probably six "months all together. Her uncle called upon her in the afternoon, "called twice, the servants always answered the bell. We took all "our meals there; didn't usually have wine; couldn't say what she "had on her table; her closet where she had her dresser was right "off the work room; every day showed us something new, and she "had beautiful clothes; those were things she had before she was in "mourning. We thought she was a countess, and until I read the "name in the paper I never dreamed that she was not."

1021 22. The court erred in sustaining the motion of the plaintiff to strike out that portion of the testimony of the witness Anna Galvin, as follows: "I think she said she was going to Cali- "fornia when we were sewing for her; getting her things ready to go."

23. The court erred in sustaining the motion of the plaintiff to strike out that portion of the testimony of the witness Victor M. Harding as follows: "She told me that she had made discoveries "that a certain woman had been supported by my father, that he "had a family, another family, an illegitimate family, and she be- "lieved her rights as a wife and those of her children to be insecure "if she deeded away any property."

24. The court erred in sustaining objections of the plaintiff to the testimony offered and questions asked by the defendant for the purpose of showing by the declarations of an aged member and head of the family that Mrs. Von Louis was not a relative of the plaintiff as claimed by him, and the court erred further in sustaining objections to offers of testimony and questions propounded for the purpose of proving a want of relationship between the plaintiff and Mrs. Von Louis by general family repute, declarations and knowledge.

25. The court erred in sustaining the motion of plaintiff "to ex-
clude all that portion of the answer alluding to his brother,"
1022 his motion having been directed to an answer of the witness Victor M. Harding as follows: "That was another reason "that he gave, but he allowed my brother George to go back, so I "thought that was not the real reason. I knew that was not the "real reason."

26. The court erred in sustaining the objection of the plaintiff to the following question asked the witness Victor M. Harding: "I "will ask how long George had been in attendance at Harvard, and "under what circumstances, prior to the time he was sent back at "this time."

27. The court erred in sustaining the objection of the plaintiff to the following question asked the witness Victor M. Harding: "Be- "fore this controversy came up between yourself and your father

"with reference to the question as to whether or not you should go "to the law school, was anything said between you as to whether or "not you were to be returned to the law school after finishing your "regular course?"

28. The court erred in sustaining the objection of the plaintiff to the following question asked the witness Victor M. Harding: You "have been asked as to whether money was scarce with your father "during the year 1888 or 1889; I will ask you whether or not "money was scarce with him during that time, and I will ask you
"to state in your answer any expenditures that he may have
1023 "made during that time as going to show whether money
"was scarce with him?"

29. The court erred in overruling the objection of defendant to the offer made by the plaintiff of the certificate of evidence in the transcript of the proceedings in the Illinois court, and in receiving said certificate of evidence in evidence.

30. The court erred in denying the motion of the defendant to strike out that portion of the testimony of the witness Abner C. Harding as follows: "I do not remember just at this moment her "precise words. Her reasons to my mind were extremely unsatis- "factory. I know this much that the girls were in perfect familiar- "ity with her alleged proofs to my astonishment, having seen what "she claimed were proofs, some documents or other that have been "in this case. I can remember that Susie astonished me in that "way."

31. The court erred in denying the motion of the defendant to strike out the following portion of the testimony of the witness Abner C. Harding: "There were other conversations aside from that, "a great number of conversations. I accused her of having told the "girls things about the boys, things that they never should have "known—these younger girls. Because the girls threw things up "in the boys' faces which might or might not be true, but probably
"were not, and they ought never to have been in possession
1024 "of the girls as possible facts, or the existence of such things
"ought not to have been in the girls' minds. I told her she was "poisoning the girls against their brothers, and that she was making "an irreparable breach between us, and that aside from all that, "whether the boys quarrelled with the girls for life, it was placing "the girls where they could never look with decency and respect on "any man, and the girls at that time were full of notions that all "men were simply vile, and that the vilest of the vile lived in that "house, and that one of them lived up above us. This is what I "told my mother that the girls had told the boys and she defended "them. She attacked the whole Harding family in substance and "in detail."

32. The court erred in denying the defendant's motion to strike out the following portion of the testimony of the witness George F. Harding, Jr.: "I heard my mother mention the subject of scandal- "ous reports in connection with Mrs. Fuller and Mr. Henderson;

"she said that she didn't believe anything was wrong; she said that "Mr. Fuller had forbidden Mr. Henderson the house, on the ground "that there was something wrong between them; her reference to "this was prior to the trouble in our family, and she said she did "not believe the truth of the scandalous report."

33. The court erred in denying the defendant's motion to
1025 strike out portions of the testimony of the witness Beatrice Harding, said motion to strike out being as follows: "I object "to and move to strike out that part of the testimony beginning "with the words 'Do you know of your father's aiding Amelia,' "down to including the words 'A. What papa feels—I think that "'he loves her just the same,' on the ground that it is incompetent, "irrelevant and immaterial and not tending to support any issue in "this case."

34. The court erred in overruling the objection of the defendant made to certain testimony and to certain questions tending to bring out testimony with reference to the alleged relations between Mrs. Fuller and Lucius J. Henderson, and in permitting said questions to be answered and in permitting said testimony to remain in the record.

35. The court erred in denying the motion of the defendant to strike out that portion of the testimony of the plaintiff as follows: "She has not been a good wife, quite otherwise. To state the facts "is very disagreeable. There are many ways in which I could "amplify that statement. If I were to single out any one, I should "refer to her desire and determination to live abroad, away "from her husband, and to her relations to Lucius J. Henderson "and to others and to her refusal to execute the necessary exten- "sions of mortgages upon which the fortune of her husband was "at stake."

1026 36. The court erred in overruling the objection of the defendant to and denying the defendant's motion to strike out the following portion of the testimony of the plaintiff: "In 1872 I "cabled her $1,000 to pay her expenses home from Vienna. I sent "also other money for that purpose. She was in Vienna with her "family and brought home that money without my knowledge, "leaving me to pay the bills, and under the impression that she "had expended it, compelling me to pay, for example, a very large "additional sum for her passage home upon the Cunard Steamship "Company line, which passage she had got upon credit, claiming that "she had not the money to pay it. The total claimed by the Cunard "company, I have forgotten exactly, my recollection is it was about "$500 to $800—$200 or $300 at least in excess of the passage money "if paid in advance; this additional expense was entailed on me "because the money sent her was not used as she was directed to "use it; instead she brought it home without my knowledge, leav- "ing me to pay this and other bills for which it was sent."

37. The court erred in denying the motion of the defendant to strike out that portion of the testimony of the plaintiff as follows:

"He is as mild mannered a man as I ever saw towards them and as
"gentle as I know of; I am sure that Mrs. Harding has always said
"that he was as kind a son as she had, and so far as kindness
1027 "was concerned quite beyond Victor in that particular and I
"can say the same thing; he is the very last one to do any-
"thing of that kind."

38. The court erred in denying the motion of the defendant to strike out that portion of the testimony of the plaintiff as follows: "I am "sure that Mrs. Harding has always said that he was as kind a son "as she had, and so far as kindness was concerned quite beyond "Victor in that particular and I can say the same thing; he is the "very last one to do anything of that kind."

39. The court erred in denying the motion of the defendant to strike out that portion of the testimony of the plaintiff as follows: "Q. There has been some testimony about Mrs. Harding's trip "abroad and the moneys expended by her, and certain notices served "withdrawing the notices that commissions would be sued out to "take depositions. State your personal knowledge as to these mat-"ters? A. I personally notified Gen. Stiles that the testimony could "not be taken in Buda Pesth and afterwards in Yokohama, but I "gave him careful notice in that first instance immediately upon my "return from Massachusetts, and then learned for the first time that "Mrs. Harding had gone with her children across the ocean and "urged him to telegraph her or advise her at once that we could "not have our witnesses present and could not go on at that time. "This talk with Gen. Stiles was while Mrs. Harding was on the
"ocean, three or four days after she had sailed from New
1028 "York; we afterward served a careful written notice, which
"we have here, upon him. Gen. Stiles said that he could "reach Mrs. Harding and would advise her at once, and afterwards "told me that he had done so. She could have expended nothing "in that trip up to that date, except the cost of going abroad, of "crossing the ocean both ways; her own personal expenditures or "that of any one attorney, could not have exceeded $300 at the "time; she was down East when she went abroad after taking the "testimony at Onset bay; she was advised as I state."

40. The court erred in overruling the objection of the defendant to the following question asked the plaintiff: "You may state to "the court whether the niece therein referred to was the Mrs. "Von Louis in question," and in permitting said question to be answered.

41. The court erred in overruling the objection of the defendant to the following question asked the plaintiff: "Did Mrs. Louis "marry again in 1888 or 1889, and live abroad only visiting "Chicago at times thereafter?" and in permitting said question to be answered.

42. The court erred in denying the motion of the defendant to strike out the answer of the plaintiff as follows: "That is my in-"formation; that she married and lived abroad and married a

"brother of her first husband," said answer being the answer
1029 to the question referred to in the specification last above set forth.

43. The court erred in overruling the objection of the defendant to the following question asked the plaintiff, "State what was done "at your office in Chicago since 1895, May of 1895, relative to your "declaring your residence to be in the city of San Diego," and in permitting said question to be answered.

44. The court erred in denying the motion of the defendant to strike out the following answer of the plaintiff to the question referred to in the specification last above set forth: "The house was practically closed."

45. The court erred in overruling the objection of the defendant to the following question asked the plaintiff, "Is there anything "further that you have not stated as to what you did in relation to "your residence being in San Diego, California, either at the house "of office after the month of May, 1895? and in permitting said question to be answered.

46. The court erred in denying the motion of the defendant to strike out the following answer of the plaintiff to the question referred to in the specification last above set forth: "I am unable to 'state what I did, more than declarations and notices, and the fact that
"I was not in the house but a very small portion of the time
1030 "when I was in the city; slept occasionally in one room, the "rest of the time it was closed up, a long time."

47. The court erred in refusing to permit the defendant to compel the plaintiff to make answer to a certain question as shown by such ruling set forth in the following excerpt from the transcript of the proceedings in said case: "Q. You think it was a conspiracy between "them—have you any facts you can state to the court upon which "you base your belief there was a conspiracy? A. Yes. Q. I "would like to have you state those facts. A. If the court wants "me to rehearse this evidence—The COURT: I think he has been all "over this ground—been rehearsing the facts for the last two weeks "between you. Mr. WORKS: I understand the court does not desire "to have him answer then? The COURT: No, sir. Mr. WORKS: I "except to the ruling. The COURT: The examination has extended "far enough in that direction."

48. The court erred in denying the motion of the defendant to strike out the following statement of the plaintiff made on the stand: "I would like to add to that answer an explanation; I understood "the relation was much closer before investigation, that she was "really a niece in the first instance, and was so advised."

49. The court erred in denying the following motion of the
1031 "defendant to strike out "I move to strike out that portion "of it which relates to what he was advised as being hearsay "and not responsive to any question," the said motion having been directed to the statement of plaintiff in the specification last above set forth referred to.

50. The court erred in overruling the objection of the defendant to the following question asked the plaintiff, "Referring to the "mortgages which you were asking Mrs. Harding to sign as exten- "sions, had she not previously joined with you in the execution of "such mortgages?" and in permitting said question to be answered.

51. The court erred in overruling the objection of the defendant to the following question asked the plaintiff, "At that time there "was nothing asked of her in the way of encumbering her interest "in your estate further?" and in permitting said question to be answered.

The foregoing bill of exceptions is hereby settled and allowed as correct, this 30th day of July, 1901.

N. H. CONKLIN,
Judge of the Superior Court.

Endorsed: Filed July 30, 1901. Will H. Holcomb, clerk, by Walter M. Edwards, deputy.

1032 Title of Court and Cause.

Certificate to Judgment Roll.

C. C. P., sec. 670.

I, the undersigned, county clerk of the county of San Diego, State of California, and *ex-officio* clerk of the superior court in and for said county, do hereby certify the foregoing to be a true copy of the judgment entered in the above entitled action, and recorded in Judgment Book 19 of said court, at page 280. And I further certify that the foregoing papers hereto annexed, constitute the judgment roll in said action.

Witness my hand and the seal of said court, this 1st day of February, 1901.

WILL H. HOLCOMB, *Clerk.*

Endorsed: Filed Feb'y 1st, 1901. Will H. Holcomb, clerk.

Title of Court and Cause.

Notice of Intention to Move for a New Trial.

Take notice that defendant intends to move the court for a new trial in this case, upon the following grounds:

1033 1. Insufficiency of the evidence to justify the decision and that it is against law.

2. That the decision is against law.

3. Errors in law, occurring at the trial and excepted to by defendant.

The said motion will be based upon the papers and files in said action and upon a bill of exceptions to be hereafter prepared.

WORKS & WORKS,
Attorneys for Defendant.

To George F. Harding, the said plaintiff, and Messrs. Puterbaugh & Puterbaugh, attorneys for plaintiff.

(Duly verified.)

Endorsed: Filed Feb. 11, 1901. Will H. Holcomb, clerk, by T. J. Storey, deputy.

Motion for New Trial and Order Denying Same.

Minutes of the court.

TUESDAY, *July 30th*, 1901.

1034 Come the parties by their respective attorneys, and the defendant now moves the court for a new trial in this case, upon the following grounds:

1. Insufficiency of the evidence to justify the decision and that it is against law.

2. That the decision is against law.

3. Errors in law, occurring at the trial and excepted to by defendant.

The defendant introduces in support of his motion the papers and files in said action and a bill of exceptions, prepared and signed by the judge.

The motion is argued by counsel, and submitted to the court, and the court denies the motion, to which ruling the defendant excepts.

Title of Court and Cause.

Notice of Appeal.

Take notice that the defendant in the above-entitled action hereby appeals to the supreme court of the State of California, from the judgment therein given, made and entered in the said superior court, on the 31st day of January, 1901, in favor of the plaintiff in said action, and against said defendant and from the whole
1035 of said judgment, and also from the order denying said de-

fendant's motion for a new trial therein made and entered in the minutes of said court the 30th day of July, 1901.

Yours, etc.,

WORKS & WORKS,
Attorneys for Defendant.

To the clerk of said superior court and M. L. Ward, Esq., attorney for plaintiff.

Dated this 31st day of July, A. D. 1901.

Endorsed: Filed Jul- 31, 1901. Will H. Holcomb, clerk, by T. J. Storey, deputy.

Title of Court and Cause.

Affidavit.

STATE OF CALIFORNIA, *County of San Diego,* } ss:

Walter G. Van Pelt, being duly sworn, says that he is and was at the time of the service of the paper herein referred to, a citizen of the United States over the age of eighteen years, and not a party to the above entitled action; that he served the notice of appeal in said action, which said notice of appeal was duly filed in the office of the county clerk of the county of San Diego, State of California, on the 31st day of July, 1901, upon the plaintiff, by leaving a copy thereof at the office of M. L. Ward, the attorney for said plaintiff; that the said copy was left at the said office of said M. L. Ward between the hours of 9 a. m. and 5 p. m. on said 31st day of July, 1901; that no clerk was in the office of said M. L. Ward, and that no person was in charge thereof at the time when affiant called at said office to serve said notice of appeal, and that affiant left said copy, which was a full, true and correct copy of said notice of appeal, on the desk of said M. L. Ward in his said office in a conspicuous place, between said hours.

1036 & 1037

WALTER G. VAN PELT.

Subscribed and sworn to before me, this 2nd day of August, 1901.

[SEAL.]

LEWIS R. WORKS,
Notary Public in and for the County of San Diego, State of California.

Endorsed: Filed Aug. 2, 1901. W H. Holcomb, clerk, by T. J. Storey, deputy.

* * * * * * *

1038 Received a copy of the within transcript this 7th day of September 1901.

M. S. WARD,
Att'y for Pl'ff and Respondent.

1039 In the Supreme Court of the State of California.

GEORGE F. HARDING
v.
ADELAIDE M. HARDING. } L. A. No. 1170.

1901.
Sept. 10. Filed transcript
" 12. " acknowledgment of service of tran.
Oct. 14. " apps. brief
" 15. " order 30 days granted app. to file.
1902.
Feb. 10. Filed apps. P. & A.
Sept. 20. " resps. brief
1903.
March 18. " apps. reply brief
April 9. Cause argued & submitted
" 22. Filed argument of E. W. Britt
Oct. 17. The judgment is affirmed
Nov. 7. Filed pet. for rehearing
" 16. By the court. Rehearing denied
" 17. Remittitur to county clerk.

1040 And thereupon upon the 17th day of October 1903 the court filed the following opinion in said cause:

GEORGE F. HARDING, Plaintiff and Respondent,
vs.
ADELAIDE M. HARDING, Defendant and Appellant. } L. A. No. 1170.

This action was prosecuted by the plaintiff to obtain a divorce from his wife for her desertion of him. The findings and decree of the court were in favor of plaintiff, and from the judgment of divorce which followed, and from the order refusing her motion for a new trial, defendant appeals.

The parties to the action, at the time of the alleged desertion, resided in Chicago, in the State of Illinois. There in February, 1890, the defendant, for reasons which she believed necessitated this action, had left her husband's home, and ever since has continued to live separate and apart from him. The husband thereafter removed to and became a resident of the county of San Diego, State of California, and there commenced this action. The court determined in

favor of the *bona fides* of his residence, and as this was the determination of a question of fact upon conflicting evidence, that determination here can not be disturbed. Thus in the estate of Newman, 124 Cal. 688, the question was whether the widow of the decedent, claiming administration of his estate, was a resident so as to be entitled to letters. This court said: "This court found in her favor. Her intention constituted the material issue, and there certainly was evidence to support the finding. The difference between this case and the case *In re* Donavan, 104 Cal. 625, is that there the court found against the petitioner as to that fact. In any case, this court must abide the conclusion." In Chicago Railway Co. *vs.* Ohle, 117 U. S. 123, the court say: "There was certainly some evidence
1041 that when Ohle went to Chicago on the 6th of November, he intended to take up his home there at that time, and actually did so. Such being the case, it was error to refuse to charge the jury that this was the fact. It is not for us to decide that the jury brought in a wrong verdict under a correct charge, if the record shows, as it does, that there was some evidence to support the finding which was made." In Hope *v.* Flintge, 140 Mo. 390, the question there being one of residence, the supreme court said: "It was a question of fact in which the intent of the parties largely entered, and the circuit court found that they were residents within the meaning of the law, and that finding we will not disturb."

The same rule must also be applied to the question of the sufficiency of the evidence. It was in sharp conflict, and upon either side was the corroborating evidence of the children, for the house was, unfortunately, divided against itself. The determination of the trial court under these circumstances, that the defendant had been guilty of desertion, can not here be disturbed.

It is earnestly insisted, however, that the question of defendant's alleged desertion was not open to inquiry, but that its consideration had been foreclosed by a judgment of the Illinois court, which judgment operated as an estoppel. The facts in this regard are the following: Shortly after Mrs. Harding left her husband's home, she instituted in the courts of Illinois an action for separate maintenance against her husband, which action the laws of Illinois permit when a wife is living separate and apart from her husband "without any fault upon her part." The action was contested by the husband, and reference was made to a master in chancery for the taking of evidence, and evidence was taken. Finally and before the determination, the husband filed his stipulation in the action,
1042 by the terms of which he conceded his obligation to support his wife; he alleged his confidence in his ability to make good his defense; asserted that it seemed to be in the interest of peace and to end litigation to consent to a decree for such sum as the court might find to be equitable, and expressed his willingness that a degree for separate maintenance should be entered in favor of the plaintiff without a finding or trial of the issue as to whether she was living apart without fault on her part. The stipulation

then proceeded: "To this end, I declare my willingness to stipulate, and I do hereby stipulate that the plaintiff, at the time of the commencement of this suit, was living, and ever since has been living, separate and apart from her husband without her fault, and may take a decree with my consent for such sum as may be reasonable and just for her separate maintenance." Following this stipulation the court made its order of reference to the master "to take evidence and report the same, with his conclusions upon the issue in question, as to the amount or amounts, if any, to be allowed complainant and to be decreed to be paid by the defendant to complainant for alimony, and upon the other issues herein, other than the question as to whether complainant, at the time of the commencement of this action, was, and since that time has been, and is, living separate and apart from her husband, the defendant, without her fault; said defendant having admitted upon the record herein, as by his written stipulation filed herein on January 3, 1893, and *for the purpose of this trial only*, that the complainant was at the time of the commencement of this suit and since that time has been and is living separate and apart from her said husband without her fault." After litigation attending the fixing of the amount, the circuit court of Cook county filed with
1043 its decree its "certificate of evidence," wherein the court declares: "In settling the terms of said decree, the attorney for the complainant requested the court to find in such decree that the allegations in the said bill of complainant as amended herein are true, but that the defendant objected to such finding on the ground of the paper filed herein on January 3d, 1893, and presented to the court by the defendant, and the contents thereof, and on the further ground that such finding was not warranted by the proof; and the court stated that it, the court, had not considered and passed on that question, for it, the court, regarded it as unnecessary in view of the said paper of defendant filed herein on January 3, 1893, (the stipulation above referred to), and thereupon such finding was not inserted in such decree." This statement was provided for in the decree rendered and having been made a part of the record, such certificate itself becomes part thereof. (Rawson *v.* Rawson, 37 Ill. App. 495; Ensminger *v.* Powers, 108 U. S. 292). It was under such circumstances that the decree was given, and it is this judgment which defendant insists raises an estoppel against plaintiff and forbids an inquiry by the courts of this State into the matter of defendant's desertion. But waiving the question as to whether the issue under the Illinois statute, that a wife is living apart from her husband without any fault of her own, is identical with the issue presented under the laws of this State in an action for divorce upon the ground of desertion, still we think the contention of respondent can not be upheld. It is fundamental that no more force is to be allowed to the judgment of a sister State, when raised as a bar by way of estoppel in an action between the parties in another State, than would be accorded to that judgment by the courts of the State which

rendered it, or as Mr. Freeman puts it: "The first question
1044 to be determined in regard to a judgment of another State,
after jurisdictional inquiries have been satisfactorily answered, is what is its effect in the State whence it was taken? The effect which it has there is precisely the effect which must be accorded to it in every other State. It must not be given any greater effect than it has in the State where it was rendered." (2 Freemen on Judgments, sec. 575). By the rule decision in the courts of Illinois adopting that of the English courts, a consent judgment operates to estop the parties no further than is necessary to secure the enforcement of the judgment or decree in the particular matter in which the consent judgment was given, and it is not a bar to any inquiry into the same question in any other action. Thus in Wadhams *v.* Gay, 73 Ill. 417, the syllabus correctly states the decision of the court in the following language: "*Res judicata* is decision of the court upon a contested matter between parties. When a judgment or decree is rendered by consent, or is the result of a compromise, it can not be admitted as *res judicata*." And in the opinion the court quotes with approval the following from the House of Lords in Jenkins *v.* Robinson, 1 H. L. Sc. 117: "The interlocutor in a former action having been the result of a compromise between the parties, it can not be considered as a *judicium*; nor can it be admitted as *res judicata*. * * * In my opinion *res judicata* signifies that the court has, after argument and consideration come to a decision on a contested matter. Here the court exercised no judicial function upon the subject. It merely exercised an administrative function by recording the interlocutor which had been agreed to by the parties." It thus appears from this case that the courts of Illinois will not allow the
application of the doctrine of estoppel to a consent judgment
1045 which merely registers the agreement between the parties,
and the same views are expressed by the highest court of Illinois, quoting at large from the case last above cited, in the late case of Farwell *v.* Great Western Tel Co., 161 Ill. 522.

We are not here considering the doctrine of estoppel as it may be applied to judgments by the courts of this State. Our consideration is limited to the determination of the rule as it obtains in the State of Illinois, for as has been said, no higher efficacy can be given to it by the courts of this State, and it appears, for the reasons stated, that that judgment having been entered into by consent, would not in the courts of Illinois raise the bar of estoppel against the determination of the issue of desertion, which was tried and determined in this State adversely to the appellant.

For the foregoing reasons, the judgment and order appealed from are affirmed.

HENSHAW, *J.*

We concur:

McFARLAND, *J.*

LORIGAN, *J.*

1046 Filed Nov. 16, 1903.
Argd. Due Nov. 16 / 03.

FRANK C. JORDAN, *Clerk*,
By I. ERB, *Deputy*.

In the Supreme Court of the State of California. In Bank.

HARDING
vs.
HARDING. } L. A. No. 1170.

By the COURT:

Rehearing denied, November 16, 1903.

1047 In the Supreme Court of the State of California, Dep't Two.

GEORGE F. HARDING, Resp. and Plain.,
vs.
ADELAIDE M. HARDING, App. and Def't. } L. A. No. 1170. On Appeal from the Superior Court in and for the County of San Diego.

OCTOBER 17, 1903.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by

HENSHAW, *J.*

We concur:
McFARLAND, *J.*
LORIGAN, *J.*

Whereupon, it is now considered, ordered, adjudged, and decreed by the court here, that the judgment and order of the superior court in and for the county of San Diego in the above entitled cause, be and the same are hereby affirmed.

Remittitur issued November 17th, 1903.
App. $12.50.

I, Frank C. Jordan, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of judgment and order denying a rehearing as shown by the records of my office.

Witness my hand and the seal of the court, this 22d day of January, A. D. 1904.

[Seal Supreme Court of California.]

FRANK C. JORDAN, *Clerk*,
By I. ERB, *Deputy*.

[Endorsed:] L. A. No. 1170. In the supreme court, State of California. George F. Harding, resp. & plain., *vs.* Adelaide M. Harding app. & def't.

1048 In the Supreme Court of the State of California.

GEORGE F. HARDING *vs.* ADELAIDE M. HARDING. } L. A. No. 1170. On Appeal from the Superior Court of the County of San Diego.

I, Frank C. Jordan, clerk of the supreme court of the State of California do hereby certify the foregoing to be a full, true and correct copy of the record and proceedings, and the opinion of the court in the above entitled cause, as the same remains of record and on file in the office of the clerk of said court, and that the same constitutes the return to the annexed writ of error.

In testimony whereof I have hereunto set my hand and affixed the seal of the said supreme court of California this 14th day of March, A. D. 1904.

[Seal Supreme Court California.]

FRANK C. JORDAN,
Clerk of the Supreme Court of California.

1049 UNITED STATES OF AMERICA, *ss:*

In the Supreme Court of the United States.

To the honorable justices of the Supreme Court of the United States:

The petition of Adelaide M. Harding respectively shows that on the 17th day of October A. D. 1903 the supreme court of the State of California rendered a final judgment against your petitioner in a certain cause wherein your petitioner was appellant, and George F. Harding was respondent for costs of such proceedings in said court and affirmed a judgment of the superior court of San Diego county in said State of California whereby said superior court ordered, adjudged and decreed that the marriage theretofore existing between George F. Harding and your petitioner be dissolved and each of said parties be freed and absolutely released from the bonds of matrimony and all the obligations thereof; as will appear by reference to the record of the proceedings in said cause, and that said court is the highest court of said State in which a decision in said suit can be had.

Your petitioner claims the right to remove said cause to the Supreme Court of the United States by writ of error under section 709 of the Revised Statutes of the United States because your petitioner

claimed in said superior court of San Diego county and in said supreme court to which said cause was taken on appeal that said suit and all proceedings therein were barred by a decree in a suit in the circuit court of Cook county in the State of Illinois between the same parties entered prior to the commencement of said suit in California and which then was and from thence hitherto has
1050 been and still is in full force and effect unappealed from and unreversed; and your petitioner claims that if full faith and credit as required by section 1, of article IV. of the Constitution of the United States had been given by said superior court of San Diego county and the supreme court of the State of California to said decree the same would have been and in fact is a complete bar to said suit in the said superior court of San Diego county and in said supreme court of California; but faith and credit was denied to said judicial proceedings in said circuit court of Cook county, Illinois and to said decree entered therein, by said superior court of San Diego county and the supreme court of the State of California and by reason of such denial judgment was rendered as aforesaid against your petitioner by both said courts of the State of California to her great wrong and detriment and in violation of the Constitution of the United States as aforesaid as appears by the record of the proceedings in said cause which is herewith submitted.

Your petitioner has attached hereto and presents herewith her assignment of errors committed by said supreme court of California and prays the allowance of a writ of error returnable unto the Supreme Court of the United States and for a citation whereby the proceedings of the supreme court of California in the premises may be reviewed.

And your petitioner will ever pray, etc.

ADELAIDE M. HARDING,
By PLINY B. SMITH, *Her Attorney.*

PLINY B. SMITH,
Attorney for Petitioner, 19–184 *Dearborn St., Chicago.*

1051 In the Supreme Court of the United States.

ADELAIDE M. HARDING, Plaintiff in Error,
vs.
GEORGE F. HARDING, Defendant in Error.
} Writ of Error to the Supreme Court of California.

And now comes Adelaide M. Harding, plaintiff in error by Pliny B. Smith her attorney and says that in the record of proceedings in the above entitled matter there is manifest error in this, to-wit:

1. The supreme court of California erred in affirming the judgment or decree of the superior court of San Diego county, California, thereby contravening the rights of plaintiff in error under the Constitution and laws of the United States.

2. The supreme court of California erred in not reversing the judgment or decree of the superior court of San Diego county California.

3. The supreme court of California erred in not holding and deciding that the superior court of San Diego county, California erred in finding as a conclusion of the law that the plaintiff there (defendant in error here) was entitled to a decree dissolving the bonds of matrimony theretofore existing between the plaintiff and the defendant and decreeing them to be freed and absolutely released from the bonds of matrimony and all obligations thereof.

1052 4. The supreme court of California erred in not holding that the decree of the circuit court of Cook county in the State of Illinois was a bar to said suit and proceedings.

5. The supreme court of California erred in not holding that full faith and credit should be given to the decree and judicial proceedings of the circuit court of Cook county, Illinois, in the case formerly pending there between the plaintiff in error and defendant in error.

6. The supreme court of California erred in not holding that full faith and credit should be given to the said decree and judicial proceedings in the circuit court of Cook county, Illinois, and that full faith and credit being so given said decree would be a bar to said suit in the superior court of San Diego county and in the supreme court of California.

7. The supreme court of California erred in not holding that the superior court of San Diego county erred in finding that the plaintiff in error did willfully and without just cause desert and abandon plaintiff (the defendant in error) and ever since has and so continues to willfully and without just cause desert and abandon the plaintiff and to live separate and apart from him without any sufficient cause or reason.

8. The supreme court of California erred in not holding that the superior court of San Diego county erred in not holding that by said decree of the circuit court of Cook county, Illinois, it had been judicially determined and adjudicated that the plaintiff in error had not willfully and without just cause deserted and abandoned the defendant in error without any sufficient cause or reason.

1053 9. The supreme court of California erred in not holding that by the decree of the circuit court of Cook county, Illinois, it had been judicially determined and adjudicated that the plaintiff in error was living separate and apart from her husband without fault on her part.

10. The supreme court of California erred in not giving full faith and credit to the record and judicial proceedings of the State of Illinois, namely, the said decree and proceedings in the circuit court of Cook county, Illinois, in the suit between the plaintiff in error and the defendant in error.

11. The supreme court of California erred in holding that the giving of faith and credit to the said decree of the circuit court of

Cook county, Illinois, did not require that said decree be held to be an estoppel in said suit.

12. The supreme court of California erred in holding that said decree of the circuit court of Cook county, Illinois, was a consent judgment or decree.

13. The supreme court of California erred in holding that the said decree of the circuit court of Cook county, Illinois, was not a bar to said suit brought in the superior court of San Diego county, California.

14. The supreme court of California erred in falling to give full or due faith and credence to the judgment of the supreme court of Illinois affirming the said decree of the circuit court of Cook county, Illinois.

PLINY B. SMITH,
Attorney for Plaintiff in Error.

1054 [Endorsed:] United Supreme Court. Adelaide M. Harding *vs.* George F. Harding. Petition for writ of error & assignment of errors. Pliny B. Smith, attorney at law, suite 19—184 Dearborn St., Chicago.

1055 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Adelaide M. Harding, appellant, and George F. Harding, respondent, wherein was drawn in question the validity of a treaty or statute of, or an authority excercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in ques-

1056 tion the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said appellant as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be

therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 60 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 15th day of February, in the year of our Lord one thousand nine hundred and four.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
JOSEPH McKENNA,
Associate Justice of the Supreme Court of the United States.

1057 UNITED STATES OF AMERICA, *ss:*

To George F. Harding, Greeting:

You are hereby cited and admonished to be and appear at a supreme court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of California, wherein Adelaide M. Harding is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Joseph McKenna, associate justice of the Supreme Court of the United States, this 15th day of February, in the year of our Lord one thousand nine hundred and four.

JOSEPH McKENNA,
Associate Justice of the Supreme Court of the United States.

1058 On this 24th day of February, in the year of our Lord one thousand nine hundred and four, personally appeared before me, the subscriber, M. Patton, and makes oath that she delivered a true copy of the within citation to M. L. Ward, Esq., an attorney for the defendant in error, George F. Harding.

M. PATTON.

Sworn to and subscribed the 24th day of February, A. D. 1904.

[Seal of Minnie Schaffnet, Notary Public, San Diego Co., Cal.]

MINNIE SCHAFFNET,
Notary Public in and for the County of San Diego, State of California.

1059 Know all men by these presents, that we, Adelaide M. Harding as principal, and John S. Miller and Pliny B. Smith as sureties, are held and firmly bound unto George F. Harding in the full and just sum of one thousand dollars, to be paid to the said George F. Harding his certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 13th day of February, in the year of our Lord one thousand nine hundred and four.

Whereas, lately at a supreme court of the State of California in a suit depending in said court, between Adelaide M. Harding appellant, and George F. Harding, respondent a judgment was rendered against the said Adelaide M. Harding and the said Adelaide M. Harding having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said George F. Harding citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date thereof.

Now, the condition of the above obligation is such, that if the said Adelaide M. Harding shall prosecute said writ to effect, and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) ADELAIDE M. HARDING. [SEAL.]
(Signed) JOHN S. MILLER. [SEAL.]
(Signed) PLINY B. SMITH. [SEAL.]

Sealed and delivered in presence of—

(Signed) VICTOR M. HARDING.

Approved by—
(Signed) JOSEPH McKENNA,
Associate Justice of the Supreme Court of the United States.

1060 Approved:
(Signed) P. S. CROSSCUP,
Circuit Judge.

[Endorsed:] Copy L. A. 1170 Harding *vs.* Harding Bond on writ of error. Filed March 10 1904 Frank C. Jordan, clerk by O. C. Fuller deputy. Copy.

1061 In the Supreme Court of the United States, October Term, 1904.

ADELAIDE M. HARDING, Plaintiff in Error,
vs.
GEORGE F. HARDING, Defendant in Error.
} Error to the Supreme Court of California.

To the clerk of said court:

I hereby beg to state that upon the hearing of the above case I shall rely upon all of the errors, the assignment of which has heretofore been filed in your office.

That the parts of the record which I think necessary for the consideration of said errors, and which you are requested to print, are as follows:

1. Pages 1 to 76, inclusive, of record.

2. That portion of pages 77 and 78 of record commencing with the words on page 77 "Mr. Puterbaugh, I offer the deposition" and including first two lines of page 78.

3. On page 80, commencing with the words in bracket-, "Here follows part of," to "testified as follows."

(I will state as explanatory that various similar excerp-s following are merely for the purpose of showing that certain testimony in the Illinois record was introduced in evidence. You will thus understand what is desired to be printed in connection with different witnesses.)

1062 4. On page 81 same clause in connection with witness, Amelia Neiderland.

5. Pages 82 and 83 same clause in connection with witness George F. Harding, Jr.

6. Page 86 same clause in connection with witness Beatrice Harding.

7. Testimony of George F. Harding commencing on page 92 as far as and including the first line on page 93, also that part of George F. Harding's testimony commencing on page 97 with word "witness" at marginal page 290, and continuing on page 98 to bottom of page.

8. Page 112 commencing with words "plaintiff here rested" at marginal page 334 and all of pages 113 to 196, inclusive.

9. Page 197 as far as "every way comfortable" in line 11.

10. Page 325 the clause in connection with testimony of Adelaide Harding commencing with "Mr. Works" ending with "testified as follows."

11. Page 382 clause in connection with introduction of testimony of Susie Harding same as before.

12. Page 428 same clause in connection with testimony of Katie Coughlin ending with words "taken for defendant."

13. Page 434 same clause in connection with testimony of Maggie Galvin.

14. Same clause in connection with testimony of Anna Galvin.

15. Same clause in connection with testimony of G. W. Brayton.

1063 16. Page 452 same as to J. J. Thiesen.

17. Page 456 and 457 same as to testimony of Edward Iverson.

18. Page 457 same as to same witness recalled.

19. Page 459 same clause as to testimony of William Reed.

20. Page 462 same as to same witness.

21. Page 465 clause relating to testimony of Clara E. Taylor.

22. Page 468 same as to testimony of Cartherine Wren.

23. Page 469 same as to testimony of Arthur C. Blayney.

24. Page 472 same as to testimony of William A. McLean.

25. Page 476 same as to testimony of Benjamin Thompson.

26. Page 477 same as to testimony of Charles B. Wright.

27. Page 482 same as to testimony of Edward P. Harris.

28. Page 483 same as to testimony of R. W. Iverson.

29. Page 485–6 same as to testimony of William A. Root.

30. Page 486 same as to testimony of Elias R. Bowen.

31. Page 487 same as to testimony of Robert Boyd.

32. Page 489 same as to testimony of Ellen Finter.

33. Page 492 same as to testimony of Clement Le Seur.

34. Page 495 same as to testimony of Ellen Le Seur.

35. Page 496 same as to testimony of Alfred P. Wright.

36. Page 498 same as to testimony of William O. Cutter.

37. Page 499 same as to testimony of Laura Hammond.

38. Page 500 same as to testimony of Frank L. Union.

39. Page 502 same as to testimony of Harriett Union.

40. Page 503 same as to testimony of Mrs. Morse.

41. Testimony of Victor M. Harding commencing on page
1064 521 with words "It was in that conversation," fifth line from bottom, and page 522 as far as words "to get a divorce" in third line, and being page 530 commencing with words "I have seen" in line 15, all of pages 531 and 532 to end of first paragraph.

42. Page 589 commencing with words "Mr. Works, we rest" and pages 590, 591, 592 and 593 to and including 4th line from the bottom.

43. Page 594 clause in connection with introduction of testimony of Abner C. Harding.

44. Pages 655 and 656 same clause as to testimony of George F. Harding, Jr.

45. Page 724 same clause as to testimony of Beatrice Harding.

46. Page 779 same clause as to testimony of Amelia Neiderland.

47. Page 825 as far as figures "1890" in 9th line.

48. Page 1002 testimony of George F. Harding, being the first four lines of the last seven lines of the page.

49. Page 1012, the last line on the page.

50. All of pages 1013 to 1035 inclusive as far as and including "T. J. Storey, deputy."

PLINEY B. SMITH,
Attorney for Plaintiff in Error.

Received copy of the foregoing this 30th day of June 1904.

WM. J. AMMEN,
Per A. B. JOYNER.

1065 [Endorsed:] Supreme Court of United States. Adelaide M. Harding, plaintiff in error, *vs.* George F. Harding, defendant in error. Statement *re* printing. Office of the clerk. Received Jul- 7, 1904. Supreme Court, U. S. Office of the clerk. Received Jul- 2, 1904. Supreme Court, U. S. Pliny B. Smith attorney at law suite 19—184 Dearborn St. Chicago.

1066 [Endorsed:] File No. 19296. Supreme Court U. S. October term, 1904. Term No. 222. Adelaide M. Harding, pl'ff in error, *vs.* Geo. F. Harding. Designation by pl'ff in error of parts of record to be printed & acceptance of service of same. Filed July 7, 1904.

1067 In the Supreme Court of the United States, October Term, 1904.

ADELAIDE M. HARDING, Plaintiff in Error, *vs.* GEORGE F. HARDING, Defendant in Error.	Error to the Supreme Court of California.

To the clerk of said court:

The defendant in error, in the above entitled cause, hereby states that he thinks it necessary for the consideration of said errors and hereby requests said clerk to print the following additional parts of the record, in said cause, omitted by said plaintiff in error, viz.:

(1.) Pages 93 to 97, beginning on the second line of page 93 and ending with the signature "George F. Harding" on page 97, line ten.

(2.) Page 109, beginning on the fourth line from the bottom; and pages 110 and 111 and 112 down to the third line inclusive.

(3.) Page 979, beginning at the fourth line and ending at the words "the house was practically closed."

(4.) Page 980, ending with the words "a long time" at middle *pf* page.

(5.) Page 981 beginning at 13th. line and ending with the word "untrue" in the fifth line from the bottom of that page.

(6.) Page 998, beginning with the 8th. line.

(7.) Beginning with the third line on page 1001, ending with 21st. line.

WILLIAM H. BARNUM,
Attorney for Defendant in Error.

Received copy of above designation of part of record to be printed this — day of September, A. D. 1904.

——— ———,
Attorney for Plaintiff in Error.

1068 STATE OF ILLINOIS, } ss:
County of Cook, }

Albert B. Joyner being first duly sworn deposes and says that he served the within designation of portions of record to be printed on Pliny B. Smith attorney for plaintiff in error named therein by delivering a true copy thereof to E. T. Thompson a person in charge of the office of said Pliny B. Smith this 24th day of September 1904.

ALBERT B. JOYNER.

Subscribed and sworn to before me this 24th day of September A. D. 1904.

ROBERT HUMPHREY,
Notary Public.

[Endorsed:] In the Supreme Court of the United States, October term 1904 Adelaide M. Harding plaintiff in error *vs.* George F. Harding defendant in error Designation by defendant in error of portion of record to be printed. William H. Barnum att'y for defendant in error.

1069 [Endorsed:] File No. 19,296. Supreme Court U. S. October term, 1904. Term No. 222. Adelaide M. Harding P. E. *vs.* Geo. F. Harding. Designation by def't in error of parts of record to be printed & affidavit as to service of same. Filed Sept. 26, 1904.

Endorsed on cover: File No. 19,296. California supreme court. Term No. 222. Adelaide M. Harding, plaintiff in error, *vs.* George F. Harding. Filed April 4th, 1904. File No. 19,296.

FILE COPY.

Office Supreme Court U.
FILED
APR 10 1905
JAMES H. McKENNEY,
Clerk

222

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

ADELAIDE M. HARDING,
Plaintiff in Error,
vs.
GEORGE F. HARDING,
Defendant in Error.

Error to
Supreme Court
of California.

Brief and Argument for Plaintiff in Error.

JOHN S. MILLER AND
PLINY B. SMITH,
Attorneys for Plaintiff in Error.

CHAMPLIN LAW PRINTING CO.

—IN THE—

Supreme Court of the United States

OCTOBER TERM, A. D. 1904.

ADELAIDE M. HARDING,
Plaintiff in Error,
vs.
GEORGE F. HARDING,
Defendant in Error.

Error to Supreme Court of California.

Brief and Argument for Plaintiff in Error.

STATEMENT.

This proceeding is a writ of error to review the judgment of the Supreme Court of California, which affirmed a decree of the Superior Court of San Diego County, entered in January, 1901, granting the defendant in error a divorce *a vinculo* from plaintiff in error (Print. Trans., pp. 1-2, 23). The writ of error is based on the ground that the California court did not give full faith and credit to a prior decree, records and judicial proceedings of the State of Illinois, as required by section 1 of article 4 of the Constitution of the United States and by section 905 of the Revised Statutes thereof.

The Supreme Court of California refused to give due credit and effect to the decree, records and judicial pro-

ceedings of Illinois on the ground (which we shall show is an erroneous one) that the Illinois decree was a consent decree, and that, by the law or usage in the courts of Illinois, such a decree was not to be considered or given effect as a *judicium* or *res judicata*.

The State of California was not, at the time of the commencement of the suit, and never had been, the matrimonial domicile of the parties.

Furthermore, prior to the commencement of the divorce suit in California, the issue involved in the case had been tried in the Circuit Court of Cook County, Illinois, and adjudicated in favor of plaintiff in error by decree entered in that court in a suit between them commenced when defendant in error was admittedly a citizen of, and both parties were domiciled in, the State of Illinois. The case will be more clearly stated if we briefly show the proceedings chronologically.

The case and decree in Illinois:

On the 3d day of February, 1890, the plaintiff in error, Adelaide M. Harding, filed her bill in the Circuit Court of Cook County, Illinois, against defendant in error, George F. Harding, alleging that she was married to him in Peoria, Illinois, on November 7, 1855; that in 1862 they removed to Chicago, where they had since resided and were then residing. The bill charged that in 1888 the defendant, her husband, began toward her a systematic course of unkind and abusive and cruel treatment, which continued until *February 3, 1890*, when, in consequence of such treatment, and after exhausting all means of reconciliation, she left defendant's house, and had ever since lived and was then living separate and apart from him without fault on her part. The bill prayed that upon the final hearing it might be found and decreed that complainant was living separate and

apart from her said husband without fault on her part, and that defendant be decreed to provide her with support and maintenance during the time she had so lived, or might continue to live, separate and apart from him in such manner as might be just and reasonable, and that custody of their two minor daughters be awarded to her (Print. Trans., pp. 44-52).

In an amendment filed May 2, 1900, the complainant amended her bill by also charging the defendant with adultery. The defendant, George F. Harding, appeared and answered the bill and amended bill with great detail, admitting their marriage and their residence in Chicago, Illinois, since 1862, and specifically stating:

> "Your defendant, further answering, says, that he denies that the said complainant left his house because unable to endure the privations and cruelties described, and after exhausting all efforts at reconciliation." (Trans., p. 56.) * * *
>
> "Defendant, further answering, says that the complainant has left the home of the defendant, and is now living separate and apart from him, without excuse therefor, and wholly of her own fault, and without the fault of defendant; and defendant upon learning of such *abandonment and desertion* by complainant, immediately sent repeated and urgent invitations to complainant to return to his house." (Trans., p. 67.)

Thus the issue was clearly and sharply presented whether the separation of the parties on February 1, 1890, and the wife's living separate and apart from her husband was without her fault, or whether she had wilfully and without just cause deserted and abandoned him.

The suit of Mrs. Harding was brought under a statute of Illinois then in force, as follows:

"Sec. 1. *Be it enacted by the people of the State of Illinois represented in the General Assembly:* That married women who, without their fault, now live, or hereafter may live, separate and apart from their husbands, may have their remedy in equity in their own names, respectively, against their said husbands, for a reasonable support and maintenance, while they so live, or have so lived separate and apart; and in determining the amount to be allowed, the court shall have reference to the condition of the parties in life, and the circumstances of the respective cases; and the court may grant allowance to enable the wife to prosecute her suit, as in cases of divorce.

"Sec. 2. Proceedings under this act may be instituted in the county where either the husband or wife resides, and the wife shall not be required to give security for costs in any such proceeding."

Much testimony was taken in the suit in different parts of the United States and abroad, and such proceedings were had that on July 26, 1897, a final decree was entered finding that the complainant, Adelaide M. Harding, at the time of the commencement of the suit (February 3, 1890) was living, and ever since had lived, and was then (at the entry of the decree) living separate and apart from her husband without her fault, and that the equities were with the complainant, and therefore ordering and decreeing that the defendant pay to the complainant $6,400 per year, and certain other allowances (Print. Trans., pp. 81–83). To this decree and every finding and every portion thereof, severally, defendant, Harding, objected and excepted, and he prosecuted an appeal therefrom to the Appellate Court of Illinois, where the decree was affirmed in all respects by that court (*Harding* vs. *Harding*, 79 Ill. App., 590); and on his further appeal from the Appellate Court

to the Supreme Court of Illinois, the decree was affirmed in all respects by the latter court, except as to the amount of alimony which was reduced to $3,600 per year (Print. Trans., pp. 73–74, 84; *Harding* vs. *Harding*, 180 Ill., 481).

It will thus be seen that the issue in the Illinois suit was whether the separation of the parties in February, 1890, and Mrs. Harding's thereafter living separate and apart from her husband, was without fault upon her part, and that question was adjudicated in her favor. If she was at fault and left her husband without cause, in other words, had she, disregarding the solemnity of her marriage vow, wilfully and without just cause, deserted and abandoned her husband, and since continued so wilfully and without just cause, to desert and abandon him and to live separate and apart from him without any sufficient cause or reason, and against his will and without his consent—which was the alleged cause of action in his California suit for decree—she could not have recovered her decree in Illinois. The following from the transcript of record in the Illinois case bears upon the question upon which the divorce suit in California turned in the Supreme Court of that state, viz., whether the Illinois decree was a consent decree.

On January 3, 1893, after the Illinois suit had been pending for nearly three years and a large amount of evidence of Harding's *delictum* therein alleged had been taken, consisting of the depositions of some twenty-eight or more witnesses, the defendant, Harding, filed in said cause, of his own motion and without Mrs. Harding's knowledge, a statement and admission (which he designated a "stipulation") in which, among other things, he stated:

> "I give my consent that a decree of separate maintenance shall be entered in favor of the plaintiff without a finding or trial of the issue in this cause.

That this consent is not collusive is sufficiently shown by the length and character of the litigation. I further offer and stand ready to make such other or further and different stipulation, by amendment of the pleadings or otherwise as may, in the opinion of your Honor, be required to make it unnecessary for the court to hear and decide upon the issue and evidence in this cause after a long and expensive hearing."

"To this end I declare my willingness to stipulate and I do hereby stipulate that the plaintiff, at the time of the commencement of this suit was living, and ever since has been living separate and apart from her husband without her fault, and may take a decree with my consent for such sum as may be reasonable and just for her separate maintenance." (Print. Trans., 72.)

Thereafter on May 10, 1893, the cause came on to be heard upon a motion to set the case down for hearing and to hear the same, whereupon the court ordered that the case be referred to a master in chancery to take evidence and report the same with his conclusions upon the issue and question as to the amount or amounts to be allowed to complainant and to be decreed to be paid by defendant to her for alimony, support or otherwise, and upon the other issues than the question as to whether complainant at the time of the commencement of the suit was and since that time had been and then was living separate and apart from her husband without her fault—the order of reference reciting: "said defendant having admitted upon the record herein and now admitting in open court that the complainant was at the time of the commencement of this suit and since that time has been and is living separate and apart from her said husband without her fault." (Printed transcript p. 78.)

Nearly three years later, and after the evidence before the master had been completed, a further adversary order was entered by the court, *nunc pro tunc* as of May 10, 1893, by which said order of reference was modified, or re-entered *nunc pro tunc* as aforesaid, with the recital above quoted made to read as follows:

> "Said defendant having admitted upon the record herein, as by his written stipulation filed herein on January 3rd, 1893, and for the purpose of this trial only, that the complainant was at the time of the commencement of this suit and since that time has been and is living separate and apart from her said husband without her fault". (*Id.* p. 79.)

The order of reference provided that upon the hearing before the master, all competent evidence theretofore taken in the case might be read and other competent evidence might be introduced by either party, (Id. p. 78-79). The evidence which had been already taken at the time of the reference, and a large amount of additional evidence, was received by the master, who filed his report on September 22, 1896, and the cause came on for final hearing at the September and October term, 1896, of the court and was taken under advisement and while so under advisement came on for further hearing upon certain petitions then pending therein, at the January term 1897, and further received by the court, and the cause was again taken and held under advisement until the entry of the final decree on July 26, 1897. That decree, which was entered at the July term, 1897, recited as follows:

> "This cause having heretofore, at the September and October term 1896 of this court, come on to be heard upon the bill of complaint as amended herein, the answer as amended of the defendant thereto, the replication of the complainant to such answer and the pe-

tition and application of complainant for the custody of the children, and upon the report of Horatio L. Wait, master in chancery of this court, filed herein on the 22nd day of September, 1896, under and in pursuance of the order of reference to him theretofore entered therein, and upon the evidence referred to in the report of said master and upon which the said hearing before him on said reference was had; and the court having at the close of the said hearing taken said cause under advisement; and this cause also having come on to be heard at the January term, 1897, of this honorable court, and said cause being under advisement as aforesaid, upon the objections and application of the complainant and against the defendant for expenses of prosecuting her suit, and upon the petition of the defendant theretofore, on January 22nd, 1897, filed herein, and the complainant's answer thereto filed February 4th, 1897, and upon the proofs and evidence taken and heard in open court upon said hearing last mentioned; and the court having heard the argument of counsel and having thereupon taken the said cause under advisement." (*Id.* p. 81.)

By the decree, the court "having considered and being duly advised in the premises," thereupon found "that the said complainant at the time of the commencement of this suit was living, and ever since that time has lived, and is now living, separate and apart from her husband, the said defendant, without her fault and that the equities of this cause are with the complainant" (*Ibid*). The decree further found, ordered, adjudged and decreed that the complainant was entitled to an allowance from defendant for her support while they had so lived separate and apart and while they should so live separate and apart, and decreed the sum of $6,400 from the date of the entry of the decree, to be without prejudice to the previous order of July 1,

1890, allowing $300 per month during the pendency of the suit, with certain other allowances; and also found and decreed that the complainant should have the custody of the two minor daughters (*Id.* 82); and the decree further recites as follows, and this clearly disposes of the contention that that decree was a consent decree:

> "And the said defendant objects and excepts to the foregoing decree, and to every finding and every portion thereof, severally, and prays an appeal therefrom to the Appellate Court in and for the First District of Illinois, which appeal is hereby allowed" (*Id.* 83).

The parties were allowed sixty days from the date of entry of the decree within which to present a certificate of the evidence and proceedings during or subsequent to the January term, 1897—the previous evidence heard before the master on the reference (which included the evidence theretofore taken in the cause and the evidence taken before the master), being already in the record as a portion of the master's report (*Id.* 81-83). Such certificate of evidence was presented, settled and signed September 24, 1897, at the September term of the court (*Id.* 91-92). This certificate recited that the defendant at the time of the entry of the decree excepted to all and to each and every part thereof (*Id.* 91). The certificate also recited as follows:

> "In settling the terms of said decree, the attorney for the complainant requested the court to find in such decree that the allegations of the said bill of complaint as amended herein are true, but the defendant objected to such finding on the ground of the paper filed herein on January 3, 1893, and presented to the court by the defendant, and the contents thereof, and on the further ground that such finding was not warranted by the proof; and the court stated that it, the court, had

not considered or passed on that question, for it, the court, regarded it as unnecessary, in view of the said paper of defendant, filed herein January 3, 1893; and thereupon such finding was not inserted in said decree." (*Id.* 91-92.)

In Harding's own testimony in the California case he says as to his filing the admission in the Illinois case:

"The testimony abruptly stopped with my stipulation of January, 1893, and after that we ceased to desire testimony on the object of adultery, and that the charges of cruelty were unnecessary—testimony upon that was unneccessary, but put in some and some as to other matters, bearing on—whatever it might be, tickets, furniture, but not immediately though, but that was for greater caution, lest we might be examined—the other side, we expected them to put in proof upon all the issues which had—that were at issue and that were sustained by the Supreme Court. In making my explanation I have been referring to the suit for maintenance brought in Illinois in February, 1890" (Print. Trans. 94-95).

And again, (referring to the deposition of Mrs. Louis, his co-respondent in the Illinois case,) he says:

"Q. Was her deposition ever taken for use in the Illinois case, or in this case, and was her testimony ever used in either? A. No, We never got to the taking of our testimony in that case except the testimony of Mrs. Louis—we never get any further on the question of adultery. We got through with Mrs. Louis' testimony. We took hers.

"Q. At about this stage then, when the testimony on this adultery issue had been produced from the other side you made this statement which has been introduced in evidence here as a part of the record in

the Illinois case? A. No, it was January 3rd, 1893, and their testimony had been taken in 1890 and early in 1891, I think. There was a lapse of a year or two in the taking of testimony; and a stipulation was made and we found it unimportant to take it, just as the stipulation states. I stand by that stipulation."

The California divorce case here in question.

On August 31, 1897, one month after the decree in the Illinois court above referred to in favor of plaintiff in error, the defendant in error, George F. Harding, filed in the Superior court of San Diego County, California, his complaint in the suit here at bar against his wife, the plaintiff in error, alleging that he had been a resident of California for a period of over one year, and of the county of San Diego over three months immediately preceding the commencement of his action; that *on or about the month of February, 1890*, the defendant, Adelaide M. Harding, disregarding the solemnity of her marriage vow, wilfully and without just cause deserted and abandoned the plaintiff, and ever since had and still continued so to wilfully and without just cause desert and abandon the plaintiff and to *live separate and apart from him without any sufficient cause or reason* and against his will, and without his consent, and demanding judgment that the bonds of matrimony existing between them be dissolved. (Print. Trans. 1-2.)

It will thus be seen that the issue presented by the plaintiff in that suit—the defendant in error here—was the identical issue previously presented by the bill filed by Mrs. Harding in the Circuit Court of Cook County, Illinois, and which had been adjudicated by that court.

The pretended desertion and abondment alleged in Harding's bill for divorce was the same withdrawal by her from his house and thereafter living separate and apart from her

husband, which was set up by Mrs. Harding in her bill in the Illinois court, and therein found and adjudged to be without her fault.

The evidence in the case, which will be referred to later, still further identifies the issues in the two cases.

Mrs. Harding appeared by counsel in the Superior Court of San Diego County, California, and on June 22, 1900, filed her answer denying that the defendant in error was or ever had been a resident of California; and denying that she had at any time wilfully and without just cause deserted him. Her answer set up the statute of Illinois above mentioned and the proceedings and decree in her suit against her husband in the Circuit court of Cook County, Illinois, and alleged that court to be a court of general jurisdiction.

Her answer also set up that in said Illinois suit defendant Harding by his statement in writing by him filed therein solemnly admitted of record that the plaintiff therein, Adelaide M. Harding, at the time of the commencement of that suit was living and ever since had been living apart from her husband without her fault; and her answer alleged that the said living by Mrs. Harding separate and apart from her husband mentioned in said statement of George F. Harding, was the same identical living separate and apart from him referred to his complaint for divorce; and that the separation and leaving by Mrs. Harding of George F. Harding mentioned in her bill in the Circuit Court of Cook County, Illinois, was the same separation and leaving of him and the same living separate and apart from him which was mentioned and referred to by George F. Harding in his complaint in the Superior Court of San Diego county. Her answer pleaded his said admission of record in the Illinois court and the final decree of that court in bar of the suit in California. (Print Trans. pp. 2-19.)

By a supplemental answer Mrs. Harding set up the proceedings on Harding's appeals, the affirmance in the Appellate Court and the proceedings and judgment of June 17, 1899, in the Supreme Court of Illinois on Harding's appeal from the final decree of July 27, 1897, of the Circuit Court, and the further decree of the Circuit Court of Cook County entered on the mandate of the Supreme Court modifying the former decree with respect to the amount of the allowance to Mrs. Harding. Her supplemental answer pleaded and set up said final decree as so modified as a bar to and estoppel in his California suit (*Id.*, 19-22). No reply was filed by plaintiff, Harding, to Mrs. Harding's answer, but the divorce came on to be heard January 14, 1901, upon the complaint and upon her answer and supplemental answer, and upon the evidence introduced.

A transcript of the record of the Illinois suit and decree exemplified as provided by the act of congress, was introduced in evidence on Mrs. Harding's part, upon the hearing of the California suit (Print. Trans., pp. 44-86).

It has already been stated that an examination of Mr. Harding's complaint in the California court, and Mrs. Harding's bill in the Illinois court shows that the issues in the in the two suits were identical. This is rendered still more obvious by the stipulation as to evidence filed in the California court and by the evidence itself. The stipulation provides:

> "That during the trial hereof, any portion of the testimony of the witnesses in the case of *Adelaide M. Harding* vs. *George F. Harding*, begun in the Circuit Court of Cook County in the State of Illinois, as such testimony is set forth in the printed abstract of the record for appeal by the said George F. Harding in the Appellate and Supreme Courts of said state may be read in evidence as fully and with the same effect as though

the witnesses whose testimony is read, were present in this court."

And that

"Either party has the right under this stipulation to introduce any portion of said printed abstract" (Trans., p. 37).

That such testimony of witnesses who testified in the case of Mrs Harding against her husband in the Illinois case was under this stipulation, used in the California case is shown by the printed record. Reference to the record shows that the testimony of thirty-seven witnesses who testified in the Illinois case was read on the hearing in the case in California (Trans., pp. 38-9, 86-90). For brevity, the testimony of the witnesses is not printed, as it is conceived it has no bearing on this case, but the fact of their testimony having been used in the California case is cited as showing, with the stipulation under which it was used, the absolute identity of the issues in the two cases; so that not only the pleadings, the stipulation and the evidence introduced thereunder show, not only that the same issue was involved in the two cases, but that they were tried largely on the same evidence.

Harding did not allege in his bill of complaint nor did he pretend to present any proof that Mrs Harding had ever resided or been in the State of California. The parties were married in Peoria, Illinois, and resided there for some years and then removed to Chicago, where they lived together until early in 1890, and it is to be presumed (as the fact is) that Mrs. Harding has continued to reside there ever since. Such presumption is made imperative by the California Civil Code of Procedure, Sec. 1963 Par. 32, which provides that presumptions if uncontradicted shall prevail: "That a thing once proved to exist continues as

long as is usual with things of that nature." Harding's proof to sustain the allegation in his bill of his own residence in California was scant and suspicious (Print, Trans, 25-36, 40-43, 90-91, 94.) But Mrs Harding's residence remained in Illinois: *and that has always* been the matrimonial domicile.

At the conclusion of the divorce trial, the Superior Court of San Diego County entered its findings of fact: (1) That the parties were married at Peoria, Illinois in November 1855, and cohabitated as husband and wife until about February 1, 1890: (2) that plaintiff, George F. Harding, had been a *bona fide* resident of California for more than one year before the commencement of the suit, and of said county for more than three months; (3) that on or about the first day of February 1890, the defendant (Mrs. Harding) did wilfully and without just cause desert and abandon the plaintiff and ever since then had and so continued to wilfully and without just cause desert and abandon the plaintiff, and to live separate and apart from him without any sufficient cause or reason; (4) that all the allegations in the complaint were true, and that all the allegations contained in the answer in conflict with the allegations in the complaint were untrue; (5) that the Circuit Court of Cook County, Illinois, a court of competent jurisdiction, had entered decrees for allowances of alimony in favor of the defendant, which were adjudged by the Supreme Court of Illinois to be equal to the then present ability the estate of the husband." (Trans. pp. 22-23).

As conclusions of law, the court found: (1) That the plaintiff was entitled to a decree dissolving the bonds of matrimony between the parties; and (2) "That this court in this case has no jurisdiction to limit or in any way affect the decree of the Circuit Court of Cook County, State of

Illinois, adjudging a separate maintenance to the defendant." (*Id.* 23-24). Thereon, the marriage between the parties was decreed to be dissolved.

It thus appears that the Superior Court of San Diego County, California, tried the identical issue already adjudicated by the Circuit Court of Cook County, Illinois, upon the same evidence heard in the latter court, and disregarding the decree of that court and failing to give it force and credit as required by the Federal Constitution, rendered a decree finding directly opposite to the findings of the decree of the Illinois court.

The plaintiff in error thereupon appealed to the Supreme Court of California, which court affirmed the judgment of the Superior Court of San Diego County, and this writ of error is sued out to review that judgment of affirmance.

As appears by its opinion the California Supreme Court declared itself concluded on questions of fact where there was conflicting evidence, and so could not disturb the determination of the court below on the question of the *bona fides* of plaintiff's residence or the sufficiency of evidence (Trans., p. 108). The court further stated:

> "It is earnestly insisted, however, that the question of defendant's alleged desertion was not open to inquiry but that its consideration had been foreclosed by a judgment of the Illinois court, which judgment operated as an estoppel." (Trans., p. 108.)

The court then proceeded to deal with the question as to the faith and credit to which the Illinois decree was entitled. It first held from the record of the Illinois case, that the decree was a consent judgment, and then disposed of the question as follows:

> "It is fundamental that no more force is to be allowed to the judgment of a sister state, when raised

as a bar by way of estoppel in an action between the parties in another state, than would be accorded to that judgment by the courts of the state which rendered it, or as Mr. Freeman puts it, 'The first question to be determined in regard to a judgment of another state after jurisdictional inquiries have been satisfactorily answered is, what is its effect in the state whence it was taken? The effect it has there is precisely the effect which must be accorded to it in every other state' * * *. By the rule of decision in the courts of Illinois, adopting that of the English courts, a consent judgment operates to estop the parties no further than is necessary to secure the enforcement of the judgment or decree in the particular matter in which the consent judgment was given, and it is not a bar to any inquiry into the same question in any other action." (Print. Trans., pp. 109-10).

The court then considers the case of *Wadhams* vs. *Gay*, 73 Ill., 417, as so ruling, and continues:

"It thus appears, from this case, that the courts of "Illinois will not allow the application of the doctrine of "estoppel to a consent judgment, which merely regis- "ters the agreement between the parties," basing this upon the cases of *Wadhams* vs. *Gay*, *supra*, and *Farwell* vs. *Gt. Western Tel. Co.*, 160 Ill., 522, and further says:

"We are not here considering the doctrine of estoppel, as it may be applied to judgments by the courts of this state. Our consideration is limited to the determination of the rule as it obtains in the State of Illinois, for, as has been said, no higher efficacy can be given to it by the courts of this state, and it appears, for the reasons stated, that that judgment having been entered into by consent, would not in the courts of Illinois raise the bar of estoppel against the determi-

nation of the issue of desertion, which was tried and determined in this state adversely to the appellant.

"For the foregoing reasons the judgment and order appealed from are affirmed." (*Id.*, 110).

It thus appears that the Supreme Court of California considered and recognized the requirement of section 905 of the Revised Statutes of the United States, and of section one of article four of the Constitution. But, as we shall show, that court did not observe that requirement or give to the Illinois decree the credit and effect which it has by law and usage in the courts of Illinois as so required.

A consideration of these Illinois cases, as will appear later, shows that the Supreme Court of California entirely misapprehended the scope of these decisions.

A writ of error was sued out of this court upon the judgment of the Supreme Court of California. A *specification of the errors* assigned is as follows:

Specification of errors.

1. The Supreme Court of California erred in affirming and in not reversing the judgment or decree of the Superior Court of San Diego County, California, thereby contravening the rights of plaintiff in error under the constitution and laws of the United States (assignment of errors, pp. 1, 2, Trans., pp. 113, 114).

2. The Supreme Court of California erred in not holding and deciding that the Superior Court of San Diego County, California, erred in finding as a conclusion of the law that the plaintiff there (defendant in error here), was entitled to a decree dissolving the bonds of matrimony theretofore existing between the plaintiff and the defendant and decreeing them to be freed and absolutely released from the bonds of matrimony and all obligations thereof (*id.*, 114).

3. In not holding that the decree of the Circuit Court of Cook County in the State of Illinois was a bar to said suit and proceedings (*Ibid*).

4. In not holding that full faith and credit should be given to the decree and judicial proceedings of the Circuit Court of Cook County, Illinois, in the case formerly pending there between the plaintiff in error and defendant in error; and that full faith and credit being so given said decree would be a bar to said suit in the Superior Court of San Diego County and in the Supreme Court of California (*Ibid*).

5. The Supreme Court of California erred in not giving full faith and credit to the record and judicial proceedings of the State of Illinois, namely, the said decree and proceedings in the Circuit Court of Cook County, Illinois, in the suit between the plaintiff in error and the defendant in error; and in holding that the giving of faith and credit to the said decree of the Circuit Court of Cook County, Illinois, did not require that said decree be held to be an estoppel in said suit.

6. The Supreme Court of California erred in holding that said decree of the Circuit Court of Cook County, Illinois, was a consent judgment or decree; and in holding that the said decree of the Circuit Court of Cook County, Illinois, was not a bar to said suit brought in the Superior Court of San Diego County, California.

7. The Supreme Court of California erred in failing to give full or due faith and credit to the judgment of the Supreme Court of Illinois affirming the said decree of the Circuit Court of Cook County, Illinois.

There is thus drawn in question:

1. The authority exercised under the State of California to dissolve the marriage relation of this plaintiff in error,

a resident of Illinois, in disregard of a former decree of an Illinois court adjudging the same issue in her favor, on the ground of its being repugnant to section one of article four of the constitution, and to sections 905 and 906 of the revised statutes.

2. The right of plaintiff in error under said provisions of the constitution and act of congress to have the Illinois decree in her favor receive and have the same faith and credit given to them in the courts of California as they have in the courts of Illinois.

3. The jurisdiction of the subject-matter and power in the California courts in the divorce suit to dissolve the marriage between parties whose matrimonial domicile is in Illinois, for alleged causes occurring in Illinois, on the ground that the divorce proceedings in the California court do not constitute due process within the fourteenth amendment.

BRIEF.

I.

This court has jurisdiction to review the ruling in question of the Supreme Court of California upon this writ of error.

The following cases are conclusive on this question:

Andrews vs. *Andrews*, 188 U. S., 14.
Atherton vs. *Atherton*, 181 U. S., 155.
Bell vs. *Bell*, 181 U. S., 175.
Streitwolf vs. *Streitwolf*, 181 U. S., 179.
Lynde vs. *Lynde*, 181 U. S., 183.
Water Power Co. vs. *R. R. Co.*, 172 U. S., 475.
Central Natl. Bank vs. *Stevens*, 169 U. S., 432.
Huntington vs. *Attrill*, 146 U. S., 657.
Gt. Westn. Tel. Co. vs. *Purdy*, 162 U. S., 329.

In *Andrews* vs. *Andrews*, a writ of error to Massachusetts, on ground that faith and credit was not given to a South Dakota decree of divorce, the point was made that no federal question was presented. The report of the Massachusetts case shows no question under the federal constitution or laws specially set up, but this court held that rights under the federal constitution were in due time asserted, and the effect of the judgment was to deny those rights.

In the quotation from the opinion of the California Supreme Court, *supra*, the court recognized and considered

the federal question in recognizing the requirement that it should give to the Illinois decree the effect which that decree has in Illinois.

The federal question is then presented within the requirement of either clause of section 709, R. S.

This case comes within the second clause of section 709, because there is drawn in question the validity of an authority exercised by the Supreme Court of California, on the ground of its being repugnant to the constitution and laws of the United States.

It makes no difference by what department of the state the authority was exercised the validity of which is called in question.

R. R. vs. *Chicago*, 166 U. S., 226, 233-4.

It is thoroughly settled that in the cases under the second clause of secton 709, if the decision of the federal question was necessarily involved in the state court, and the case could not have been determined without deciding such question, this is sufficient.

Water Power Co. vs. *Street R. R. Co.*, 172 U. S., 475, 488, and cases cited.

Chapman vs. *Goodnow*, 123 U. S., 540.

However, as shown, it appears that the federal right had been by adequate specification called to the attention of the state court, had been by it considered, and that that question was necessarily involved in the determination of the cause within the requirement case under the third clause. It is settled that no particular form of words are necessary in which the claim of federal rights must be asserted. It is sufficient that it appears from the record that such rights were specially set up in such manner as to bring it to the attention of that court.

Green Bay, etc., Co. vs. *Patent Paper Co.*, 172 U. S., 58, 67-8.

It is enough that it appears from the record either that the right, so set up snd claimed, was expressly denied, or that such was the necessary effect of the judgment.

Roby vs. *Colehour*, 146 U. S., 153, 159.

If it appears from the record that the federal question must have been directly involved, so that the state court could not have given judgment without deciding it, that will be sufficient.

It is enough. where the validity of the the decreee of one state is brought before a court of another state, and the question there presented and involved and decided was as to the effect to be given to such former decree, and it is contended in this court that full faith and credit was not given as required by the federal constitution and law, to give this court jurisdiction.

Andrews vs. *Andrews*, 188 U. S., 14.
Atherton vs. *Atherton*, 181 U. S., 155.
Bell vs. *Bell*, *Id.*, 175.
Streitwolf vs. *Streitwolf*, *Id.*, 179.
Lynde vs. *Lynde*, *Id.*, 183.

Here the federal question was in fact the only question decided by the Supreme Court of California.

The following additional cases sustain the jurisdiction here:

Chicago L. I. Co. vs. *Needles*, 113 U. S., 574, 579.
Eureka Lake vs. *Yuba County*, 116 U. S., 410, 414.
Arrowsmith vs. *Harmoning*, 118 U. S., 195.
Kaukauna County vs. *Green Bay Etc. Co.*, 142 U. S., 257, 271.
Roby vs. *Colehour*, 146 U. S., 143, 159.

R. R. vs. *Adams*, 180 U. S., 28.
R. R. vs. *Osborn*, 193 U. S., 17, 28.
Laing vs. *Rigney*, 160 U. S., 531.

It is now settled that the opinion of the state court may be examined for the purpose of determining whether the federal question was presented and decided.

Water Power Co. vs. *Street Ry. Co.*, 172 U. S., 475-488-9.
Phil. Fire Assn. vs. *New York*, 119 U. S., 110, 116.

The narrower interpretation of the jurisdictional statute prevailing prior to the act of February 5, 1867 (which omitted the provision of the former act forbidding assignment of any errors except as should appear on the face of the record) is not applicable. This omission was a substantial one.

Stewart vs. *Kohn*, 11 Wall., 493, 502.
Murdock vs. *Memphis*, 20 Wall., 590, 633.

Again under the fourteenth amendment, proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.

Pennoyer vs. *Neff*, 95 U. S., 714, 733.

Jurisdiction of the subject-matter in actions of divorce depends upon domicile, "and without such domicile there was no authority to decree a divorce."

Andrews vs. *Andrews*, 188 U. S., 14, 39.

Citing and applying:

Atherton vs. *Atherton*, 181 U. S., 155.
Bell vs. *Bell*, *id.*, 175.
Streitwolf vs. *Streitwolf*, *Id.*, 179.

In *Bell* vs. *Bell*, *Stritwolf* vs. *Streitwolf*, and *Andrews* vs. *Andrews*, the question was expressly reserved whether jurisdiction to render a divorce, could be acquired by domicile in the state of the party plaintiff where there had been no matrimonial domicile in such state. (See 188 U. S., p. 40.)

That question is presented here with the additional circumstance that the California court refused to give due faith and credit to the Illinois decree.

II.

A point which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, can not be again drawn into question in any future action between the same parties or their privies, whether the causes of action in the two suits be identical or different.

Black on Judges, Sec. 504.
Stockton vs. *Ford*, 18 How., 414.
Hopkins vs. *Lee*, 6 Wheat., 109.
Smith vs. *Kernochen*, 7 How., 198.
Young vs. *Black*, 7 Cranch, 565.
Gaines vs. *Miller*, 111 U. S., 395.
Eldred vs. *Bank*, 17 Wall., 575.
Marine Ins. Co. vs. *Young*, 1 Cranch, 332.
Thompson vs. *Roberts*, 24 How., 233.
Goodrich vs. *Chicago*, 5 Wall., 566.

And the rule is aptly stated in different words by the Supreme Court of Massachusetts:

"A cause of action once finally determined, without appeal, between the parties, on the merits, by a com-

petent tribunal, can not afterwards be litigated by a new proceeding either before the same or any other tribunal."

Foster vs. *The Richard Busteed*, 100 Mass., 412.

A final decree in chancery is as conclusive as a judgment at law.

Shriver vs. *Lynn*, 2 How., 43.
Washington Bridge Co. vs. *Stewart*, 3 How., 413.
Pennington vs. *Gibson*, 16 How., 65.
Nations vs. *Johnson*, 24 How., 195.
Bryan vs. *Bennett*, 113 U. S., 179.

What has been said in the opening statement shows that the issues in the California case and in the Illinois case were identical, and they were treated as identical by the California court.

Under stipulation the same testimony used in the Illinois suit was used in the suit in California. (Ptd. Tr., pp. 37–39, 86–90.)

The California court was bound by the Illinois decree yet proceeded to adjudicate the identical issue upon, in great part, the same identical evidence and entered an opposite judgment.

The fact that the two actions were different in form makes no difference as respects the faith and credit clause of the constitution.

III.

The California court was bound by the adjudication by the Illinois court, and, in disregarding the Illinois decree the California court deprived plaintiff in error of a right under the federal constitution and statutes.

Federal Constitution, Art. IV, Sec. 1.
U. S. Rev. Stat., Sec. 905.

The clause of the federal constitution and statute referred to applies to decrees of divorce.

Atherton vs. *Atherton*, 181 U. S., 155.

This court has construed these sections of the constitution and statute to mean that the court of a state must allow to a judgment of a sister state the same effect that it has in the state where rendered.

Mills vs. *Duryee*, 7 Cranch, 481.
Renaud vs. *Abbott*, 116 U. S., 277.

In *Mills* vs. *Duryee*, it was held that this provision changed the common-law effect of judgments of other states.

See, also:

Hilton vs. *Guyot*, 159 U. S., 113, 181.

While this court, on writ of error to the Supreme Court of a state, will not take judicial notice of the law of another state, yet where the court, whose decision is under review, does take judicial notice of the law of another state, this court will do the same.

Renaud vs. *Abbott*, 116 U. S., 277.
Hanley vs. *Donoghue*, 116 U. S., 1.

The Supreme Court of California, as appears by its opinion, assumed to take judicial notice of the law of the State of Illinois. This court, therefore, will take judicial notice of the law of Illinois, and inquire whether the California Supreme Court gave to the Illinois decree the force and effect which it has in Illinois.

It is contended that the Illinois decree was a consent decree; that the California court was bound to give it only the same effect given to it in Illinois; and that in Illinois a consent decree in *res judicata* and the Supreme Court of California so held, but this view is erroneous.

(1.) The Illinois decree was not a consent decree.

(2.) If it were, it would conclude the parties to the same extent as though it were admittedly a decree *in invitum*.

(3). The courts of Illinois did not hold that a consent decree is not an adjudication and does not conclude parties, but they hold the contrary.

While the Illinois court purported to give the Illinois decree the same effect it had in Illinois, yet if that court erred in applying the rule, the jurisdiction here of the writ of error holds.

M'Elmoyle vs. *Cohen*, 13 Pet., 312.
R. R. vs. *Wiggins*, 108 U. S., 18.
Huntington vs. *Attrill*, 146 U. S., 657.

(1.) *The Illinois decree is not a consent decree.*

(*a*.) The so-called "stipulation" filed by Harding, is not a stipulation—that is an agreement between the parties—it was an admission of record of a *fact* and was so treated by the court.

(*b.*) Reference must be had to the decree to determine its character; the decree shows that the case came on to be heard, not on the *consent* of the defendant that a decree might be entered, but upon the bill, answer, replication, master's report and proof (Ptd. Tr., 16).

It matters not that the finding may have been based on the admission of the defendant.

The recital in the certificate of evidence can not affect the decree. Nothing the court may say outside of the decree can change the effect of what the decree itself speaks.

Campbell vs. *Wilson*, 195 Ill., 284.

That it was not a consent deccee is also apparent from the recital of the decree that Harding objected and excepted to every finding and every portion thereof. (Ptd. Tr., 83 and 91).

It is further apparent from the opinion of the Supreme Court of Illinois (*Harding* vs. *Harding*, 180 Ill., 481). It there appears (pp. 497-8), that Harding assumed as error the finding Mrs. Harding "was at the time of the filing of the bill, living, and ever since had been living, separate and apart from appellant without her fault."

He, consequently, did not regard the decree as a consent decree, for a consent decree can not he appealed from,

Armstrong vs. *Cooper*, 11 Ill., 540.
Knobloch vs. *Mueller*, 123 Ill., 554.
R. R. vs. *U. S.*, 113 U. S., 261.

The Supreme Court of Illinois held in the Harding case (180 Ill., p. 503) that the so-called stipulation of Harding "amply justifies the finding of a decree of the court in so far as it related to her living separate and apart from appellant without her fault."

(2.) Even if the decree were a consent decree it would have the same binding effect as thongh it were a decree *in invitum.*

Knoblock vs *Mueller*, 123 Ill., 554, 565.
O'Connell vs. *Ry.*, 184 Ill., 308, 325.
Lagerquist vs. *Williams*, 74 Ill., App., 17.

A judgment upon a *cog novit* concludes the parties.

A judgment entered, where upon trial a party waives proof of, and formally admits a fact, is conclusive. A judgment rendered upon an admission of fact or by consent, is conclusive on the parties to the same extent as though rendered upon a contest.

Black on Judg's, Sec. 705.
Ry. vs *U. S.*, 113 U. S., 261.
Burgess vs. *Seligman*, 107 U. S., 20.
Thomson vs. *Wooster*, 114 U. S., 104.
Bank vs. *Higginbottom*, 9 Pet., 48.
U. S. vs. *Parker*, 120 U. S., 89.

The rule also applies to judgments by default.
Harshman vs. *Knox Co.*, 122 U. S., 306.

Also to judgment on demurrer.
Gould vs. *R. R.*, 91 U. S., 526.
Bissell vs. *Springvalley Twp.*, 124 U. S., 225.

(3.) Such also is the law of the state of Illinois.
O'Connell vs. *R. R.*, 184 Ill., 308.
Knobloch vs. *Mueller*, 123 Ill., 554.
Lagerquist vs. *Williams*, 74 Ill. App., 17.

The Supreme Court of California misconceived the Illinois decisions and rule.

That court cited the case of *Wadhams* vs. *Gay*, 73 Ill. 415 and *Farwell* vs. *Gt. West'n. Tel. Co.*, 161 Ill., 522, as

supporting the decision that a consent decree is not *res judicata*, but misconceived the scope and meaning of those decisions, as they recognize the contrary doctrine.

The case of *Wadhams* vs. *Gay*, was a bill filed to carry into effect a previous decree in partition. The Supreme Court of Illinois held only, that on such a bill it was proper to look into the decree, and if it were erroneous, to refuse to enforce it.

In that case it was argued that the decree was entered by consent, but the court held that the party never had consented to the decree.

In *Farwell* vs. *Gt. Wst'n. Tel. Co.*, parties claimed that a previous decree was *res judicata*. The court held that it had been entered by fraud and collusion and for that reason was not binding; that equity could set aside judgments and decrees obtained by fraud, citing *Johnson* vs. *Waters*, 111 U. S., 640, thus placing itself on the doctrine held by this court.

It is, however, not necessary to invoke the rule that under the circumstances this court may take judicial notice of the laws of Illinois.

The rule in California is, that in the absence of proof, the courts of California will presume that law to be the same as the law of California.

Shumway vs. *Leskey*, 67 Cal., 458.

The presumption is even extended to the statute law of California.

Cavallaro vs. *R. R.*, 110 Cal., 348.

Applying the rule of California, a judgment by stipulation is conclusive as to all matters within the issue.

McCreery vs. *Fuller*, 63 Cal., 30;
Partridge vs. *Shepard*, 71 Cal., 470.

It follows from either course of reasoning that the question at issue in the California suit had been adjudicated in the Illinois courts, and that the effect of such decree in Illinois was to make the adjudication everywhere conclusive upon the parties; that the California courts refused to give the Illinois decree the faith and credit which it had by law and usage in the courts of Illinois.

IV.

The State of California never was the matrimonial domicile of the parties, and therefore, the courts of California had no jurisdiction of their matrimonial tatus, and the ecree of the California court was consequently for this reason also, erroneous.

The record showed that Mrs. Harding had always, since her marriage, lived in Illinois.

There was no evidence showing, or tending to show, that California had ever been the matrimonial domicile of the parties.

The rule applies, that it is to be presumed her residence, the *status* and the matrimonial domicile remained in Illinois (Cal. Civil Code of Proc., Sec. 1693, Par. 32).

A suit for a divorce is a proceeding *in rem*. The status of the parties is the *res*. In a proceeding *in rem* the jurisdiction of the court over the *res* must affirmatively appear.

It appears from the record that the matrimonial status—the *res*—was created and established in Illinois, it not appearing that this *status* had ever been removed to California, the California courts had no jurisdiction of the suit. In a proceeding *in rem* the court will not presume that the *res* existed within the jurisdiction of the court, but it must be averred and proved.

This court has not, as yet, directly passed upon the point made in this division of the brief, but in several cases it has especially reserved the question.

Bell vs. *Bell*, 181 U. S., 175.
Streitwolf vs. *Streitwolf*, 181 U. S., 179.
Andrews vs. *Andrews*, 180 U. S., 14, 40.

ARGUMENT.

I.

This court has jurisdiction to review the ruling in question of the Supreme Court of California, upon this writ of error.

The following cases are conclusive on this question: *Andrews* vs. *Andrews*, 188 U. S., 14; *Atherton* vs. *Atherton*, 181 U. S., 155; *Bell* vs. *Bell*, 181 U. S., 175; *Streitwolf* vs. *Streitwolf*, 181 U. S., 179; *Lynde* vs. *Lynde*, 181 U. S., 183; *Water Power Co.* vs. *Railway Co.*, 172 U. S., 475; *Central Nat. Bank* vs. *Stevens*, 169 U. S., 432; *Huntington* vs. *Attrill*, 146 U. S., 657; *Gt. W. Tel. Co.* vs. *Purdy*, 162 U. S., 329.

In *Andrews* vs. *Andrews*, *supra*, which was a writ of error to review the judgment of the Supreme Judicial Court of Massachusetts, on the ground that full faith and credit was not given by that court to a decree of divorce rendered in South Dakota, which was held by the Massachusetts court to be void in that state. the point was made in this court that no Federal question was presented by the record, that while possibly a Federal question might have been raised in the courts of Massachusetts which would have supported the writ of error, it did not appear that

the courts of that Commonwealth were called upon to consider any Federal question, nor did they appear to have disposed of one; and that under such circumstances the writ of error should be dismissed. So far as the report of the Massachusetts case shows, no right, privilege or immunity under the constitution or laws of the United States was specially set up and claimed in that court. Indeed, counsel for plaintiff in error relied upon the contention that it was not necessary that the Federal question appear affirmatively upon the record or in the opinion, if the adjudication of such question is involved in the disposition of the case by the state court. But this court held that it was "unquestionable that rights under the Constitution of the United States were expressly and in due time asserted, and that the effect of the judgment was to deny these rights."

In this case, the opinion of the Supreme Court of California expressly shows that the Federal question, viz. the question as to the faith and credit required to be given to the Illinois decree and proceedings, was pressed upon that court by the plaintiff in error. It is said:

> "It is earnestly insisted, however, that the question of defendant's alleged desertion was not open to inquiry, but that its consideration had been forclosed by a judgment of the Illinois court, which judgment operated as an estoppel." (Print. Trans. 108).

As we have also shown from the quotation from that opinion in the statement of the case, *supra* (page—) the California case, recognized and considered the Federal question in recognizing the requirement that it should give to the Illinois decree the effect which that decree has in Illinois, and in then considering what the rule of decision in the courts of Illinois is, and in purporting to follow what it regarded as such rule of decision. (Print. Trans. 109-10).

The California court, in other words, must be held to have had in mind, in recognizing this requirement, the provision of the Federal constitution and statute, which is the law requiring that effect to be given. The Federal question is, then, presented, within the requirement of either of the clauses of section 709 of the Revised Statutes.

But we submit that this case comes within the second clause of cases provided for in section 709, because there is here drawn in question the validity of an authority exercised by the Supreme Court of California under that state, on the ground of its being repugnant to the Constitution and laws of the United States. The California court exercised an authority under that state in adjudging, in disregard of the binding and conclusive effect of the Illinois decree, that plaintiff in error, a non-resident of that state and a resident of Illinois, was guilty of wilful desertion and abandonment of her husband without just cause, and thereafter continuing, wilfully and without just cause, to desert and abandon and to live separate and apart from him, without any sufficient cause or reason and against his will and without his consent, and in dissolving the marriage relations between the parties whose matrimonial domicile was in Illinois, and one of whom (Mrs. Harding) resided in Illinois, and for an alleged desertion committed in Illinois. The validity of that authority, so exercised under the State of California, was there drawn in question, and is here drawn in question, on the ground of its being repugnant to section 1 of article 4 of the Constitution and section 905 of the Revised Statutes, and to the fourteenth amendment to the Constitution.

It makes no difference by what department of the state the authority was exercised the validity of which is drawn in question. (*Chicago, Burlington & Quincy R. R.* vs.

City of Chicago, 166 U. S., 226, 233-4.) But here the authority exercised by the Supreme Court of California, which is the final interpreter of its own laws, must be held to have been exercised under the laws of that state; and necessarily those laws, as well as the judgment of the court, must be held to be here drawn in question.

It is thoroughly settled that in cases under the second clause of section 709, if the decision of the federal question was necessarily involved in the case in the state court, and the case could not have been determined without deciding such question, this is sufficient. *Water Power Co.* vs. *Street Ry. Co.*, 172 U. S., 475, 488, and cases cited; *Chapman* vs. *Goodnow*, 123 U. S., 540.

However, we have above shown that it appears from the record that the federal right thus relied upon had been, by an adequate specification, called to the attention of the state court, and had been by it considered, and that that question was necessarily involved in the determination of the cause, within the requirement in cases under the third class. It is settled that no particular form of words or phrases have been declared necessary in which the claim of federal rights must be asserted. It is sufficient that it appears from the record that such rights were specially set up or claimed in the state court in such manner as to bring it to the attention of that court. *Green Bay Etc. Co.* vs. *Patent Paper Co.*, 172 U. S., 58, 67-68. It is enough that it appears from the record of the case either that the right, so set up and claimed, was expressly denied, or that such was the necessary effect in law of the judgment. *Roby* vs. *Colehour*, 146 U. S., 153, 159. If it appears from the record, by clear and necessary intendment that the federal question must have been directly involved, so that the state court could not have given judgment without

deciding it, that will be sufficient. But it is enough, that in every case, like this, where the validity of the decree of one state, like the Illinois decree here, is brought before a court of another state, and the question there presented and involved and decided, was as to the effect—the faith and credit—to be given to such former decree, and it is contended on writ of error to this court that full faith and credit was not given, as required by the Federal Constitution and law, this court has jurisdiction of the writ of error. *Andrews* vs. *Andrews*, 188 U. S., 14; *Atherton* vs. *Atherton*, 181 U. S., 155; *Bell* vs. *Bell*, Id., 175; *Streitwolf* vs. *Streitwolf*; Id., 179; *Lynde* vs. *Lynde*, Id., 183. Here the Federal question was in fact the only question decided by the Supreme Court of California.

The following additional cases clearly sustain the jurisdiction here: *Chicago Life. Ins. Co.* vs. *Needles*, 113 U. S., 574, 579; *Eureka Lake Co.* vs. *Yuba County*, 116 U. S., 410, 414; *Arrowsmith* vs. *Harmoning* 118 U. S., 194; *Kaukauna County* vs. *Green Bay etc. Co.* 142 U. S., 254, 271; *Roby* vs. *Colehour*, 146 U. S., 153, 159; *Illinois Central R. R.*, vs. *Adams*, 180 U. S., 28; *Grand Rapids, Etc. R. R.*, vs. *Osborn*, 193 U. S., 17, 28; *Laing* vs. *Rigney*, 160 U. S., 531.

It is now settled that the opinion of the state court may be examined for the purpose of determining whether the Federal question was presented and decided. *Water Power* v. *Street Ry. Co.*, 172 U. S., 475, 488-9; *Phila. Fire Association* vs. *New York*, 119 U. S., 110, 116. The narrower interpretation of the jurisdictional statute prevailing prior to the passage of the act of Feb. 5, 1867, (which omitted the provision of the former act forbidding the assignment of any errors except as should appear on the face of the record), is not applicable. This omission was a sub-

stantial one. *Stewart* vs. *Kahn*, 11 Wall., 493. 502; *Murdock* vs. *Memphis*, 20 Wall., 590, 633.

Again, it has been recognized that under the Fourteenth Amendment, proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law. *Pennoyer* vs. *Neff*, 95 U. S., 714, 733.

Jurisdiction of the subject-matter in actions of divorce depends upon domicile. "And without such domicile there was no authority to decree a divorce." *Andrews* vs. *Andrews*, 188 U. S., 14, 39 citing and applying, *Atherton* vs. *Atherton*, 181 U. S., 155; *Bell* vs. *Bell*, *Id.* 175; *Streitwolf* vs. *Streitwolf*, *Id.* 179.

In *Bell* vs. *Bell*, *Streitwolf* vs. *Streitwolf* and *Andrews* vs. *Andrews* the question was expressly reserved whether jurisdiction to render a divorce having extra territorial effect could be acquired by a mere domicile in the state of the party plaintiff where there had been no matrimonial domicile in such state. (See 188 U. S., at page 40). That question is presented here with the additional circumstances that in decreeing a dissolution of the Illinois marriage between parties whose matrimonial domicile was in Illinois, for alleged causes occuring in Illinois, the California court disregarded and refused to give due faith and credit to an Illinois decree finding and adjudging in favor of Mrs. Harding upon the same alleged cause of action.

II.

A point which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, can not be again drawn into question in any future action between the same parties or their privies, whether the causes of action in the two suits be identical or different.

Black on *Judg.*, Sec. 504.

It is unnecessary to enlarge on this point, but reference is made to the following authorities: *Stockton* vs. *Ford*, 18 How., 418; *Hopkins* vs. *Lee*, 6 Wheat., 109; *Smith* vs. *Kernochen*, 7 How., 198; *Young* vs. *Black*, 7 Cranch, 565; *Gaines* vs. *Miller*, 111 U. S., 395; *Eldred* vs. *Bank*, 17 Wall., 575; *Marine Ins. Co.* vs. *Young*, 1 Cranch, 332; *Thompson* vs. *Roberts*, 24 How., 233; *Goodrich* vs. *Chicago*, 5 Wall., 566.

The rule is aptly stated in different words by the Supreme Court of Massachusetts:

> "A cause of action once finally determined, without appeal, between the parties, on the merits, by a competent tribunal, can not afterwards be litigated by a new proceeding either before the same or any other tribunal." *Foster* vs. *The Richard Busteed*, 100 Mass., 412.

A final decree in chancery is as conclusive as a judgment at law. *Shriver* vs. *Lynn*, 2 How., 43; *Washington Bridge Co.* vs *Stewart*, 3 How., 413; *Pennington* vs. *Gibson*, 16 How., 65; *Nations* vs. *Johnson*, 24 How., 195; *Bryan* vs. *Rennett*, 113 U. S., 179.

Discussion of these points is unnecessary. The only question can be. Was the issue in the California case

identical with that in the Illinois case? What has been said in the opening statement shows that the issues were identical; and they were treated as identical by the California courts (Trans., pp. 23-24, 108-9).

The allegations in the bill in the Illinois case on which that suit was based, was that on *February 1, 1890*, the complainant (Mrs. Harding) was living seperate and apart from her husband without her fault (Trans. p. 50). He answered denying this allegation of the bill and alleging that she was "living seperate and apart from him, without excuse therefor, and wholly of her own fault, and without the fault of defendant; and defendant upon learning of such *abandonment and desertion* by complainant, immediately sent repeated, and urgent invitations to complainant, to return to his house." (Trans. p. 67.) On that issue the case turned.

In his complaint in the California case he alleges "that on or about the *month of February, 1890*, the defendant disregarding the solemnity of her marriage vow, wilfully and without just cause deserted and abandoned the plaintiff, and ever since has been, and still continues so to wilfully and without just cause desert and abandon the said plaintiff, and *live separate and apart from him*, without any sufficient cause or reason, and against his will and without his consent."

In both the bill in the Illinois case and the complaint in the California case the allegations are that she was living separate and apart from her husband. In both cases the living separate and apart is that of February 1890. As already shown the identification is made, if it were possible, more complete by the fact that the same testimony used in the Illinois suit was stipulations used in the suit in California. (Trans., pp. 37-38-39-86-90.)

The question in each suit was whether the one separation and living separate and apart was by reason of her fault. The issues were absolutely identical. This was recognized by the California court and the case decided on that assumption. (Trans., pp. 23-24-108-110.) The Illinois court decided that such *status* was without fault of Mrs. Harding. The California court was bound by this decree, yet nevertheless proceeded to adjudicate the identical issue upon, in great part, the identical same evidence and entered an opposite judgment.

The fact that the two actions were different in form makes no difference as respects the faith and credit clause of the constitution.

III.

The California court was bound by the adjudication in the Illinois court, and, in disregarding the Illinois decree, the California court deprived plaintiff in error of a right under the Federal Constitution and statutes.

Sec, 1, Art. IV. of the Federal Constitution provides as follows:

> "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."

The Federal statute provides:

> "And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken." (*U. S. Rev. Stat.*, Sec. 905.)

The clause of the Federal Constitution and statute referred to applies to decrees of divorce.

Atherton vs. *Atherton*, 181 U. S., 155.

In *Mills* vs. *Duryee*, 7 Cranch, 481, since followed, and in *Renaud* vs. *Abbott*, 116 U. S., 277, this court construed these sections of the constitution and statute to mean that the court of a state must allow to a judgment of a sister state the same effect that it has in the state where rendered; and it was held in *Mills* vs. *Duryee* that this provision of the constitution changed the common-law effect of judgments of other states. (7 Cranch, 484). See also *Hilton* vs. *Guyot*, 159 U. S. 113, 181.

While this court on a writ of error to the supreme court of a state will not take judicial notice of the law of another state unless by the local law that court takes judicial notice of it; yet where the court whose decision is under review does take judicial notice of the law of another state, this court will assume that under the law and practice of the state it had a right so to do, and this court will do the same.

Renaud vs. *Abbott*, 116 U. S., 277.

Hanley vs. *Donoghue*, 116 U. S., 1.

The Supreme Court of California as appears from its opinion, assumed to take judical notice of the law of the State of Illinois, and attempted to expound the doctrine of the Illinois courts as to the effect to be given to the Illinois decree in question, and also as to the practice in the Illinois courts regarding certificates of evidence, thus, in effect, taking judicial notice of the laws of Illinois generally. This court will, therefore, take judicial notice of the law of Illinois and inquire whether the Supreme Court of California gave to the Illinois decree the force and effect which it has in Illinois.

It is contended that the Illinois decree was a consent decree; that the California court was bound to give it only the same effect given it in Illinois; and that in Illinois a consent decree is not *res adjudicata*, and the Supreme Court of California so held; but this view is erroneous in all respects.

In reply to this contention it is to be said that: (1) The Illinois decree was not a consent decree; (2) If it were it would have the same binding effect and conclude the parties to the same extent as it would had it been admittedly a decree in *invitum;* and (3) The courts of Illinois did not hold, and do not hold, that a consent decree is not an adjudication of the matters in issue and does not conclude the parties in respect to the matters decreed, but they hold the contrary.

While the opinion of the California court purported to give the Illinois decree the same effect which it has in Illinois, yet if that court erred in applying the rule, the jurisdiction here of the writ of error holds. *M'Elmoyle* vs. *Cohen*, 13 Pet., 312; *Chicago Etc. Ry.* vs. *Wiggins*, 108 U. S., 18; *Huntington* vs. *Attrill*, 146 U. S., 657.

(1.) *The decree is not a consent decree in the sense in which the term is used in the contention referred to.*

(*a.*) The so-called "stipulation" filed by Mr. Harding is not a stipulation as the term is ordinarily used in legal proceedings—that is an agreement entered into by the parties. It was an admission of record of a fact, and was treated only as such by Mrs Harding, and by the Circuit Court of Cook County.

After the evidence in the Illinois case of his *delictum*, was taken, the defendant in error, without notice to the complainant, filed in the case the paper in question on which is based the contention that the decree was entered by con-

sent, in which paper he states that he would consent to a decree against him, adding, in order that it might not be regarded as an agreement: "That this consent is not collusive is sufficiently shown by the length and character of the litigation. * * * To this end I declare my willingness to stipulate, and do hereby stipulate that the plaintiff, at the time of the commencement of this suit, was living and ever since has been living separate and apart from her husband without her fault" (Trans., p. 72). In other words he admitted the ultimate fact in issue in the case. The litigation in fact continued to be hotly carried on until October, 1899, when the Supreme Court of Illinois denied Harding's petition for a rehearing (180 Ill., 481).

The essential point in the so-called "stipulation" was the *admission of fact*, not the statement that the defendant *consented* to a decree. He apparently believed as the rule is, that the expressed consent would not justify a decree because he says, to the end that a decree may be rendered. "I do hereby stipulate," etc., the existence of the *fact* in issue.

(*b*) The decree itself, as already stated—and to the decree reference must be had to determine its character—discloses that the case came on to be heard, not on the *consent* of the defendant that a decree might be entered, but upon the bill, answer and replication, master's report and proofs and evidence (Trans., p. 81). Upon such hearing "the court having now considered and being duly advised in the premises, *doth find* that the said complainant, at the time of the commencement of this suit, was living, and ever since that time has lived, and is now living separate and apart from her husband, the said defendant, without her fault, and that the equities of this cause are with the complainant" (Trans., p. 16).

Thus the cause came on to be heard in the usual way and the court found from the evidence the essential fact. It matters not that this finding may have been based on the admission of the defendant; it was, nevertheless, an adverse finding. The recital in the certificate of evidence can not affect the decree. The decree speaks for itself, and nothing the court may say outside of the decree can change the effect of what the decree itself speaks.

Campbell vs. *Wilson*, 195 Ill., 284.

In that case the plaintiff in error filed a petition for an assignment of dower. She had previously joined with her husband in the execution of a deed which had been foreclosed in chancery and a sale made under a decree. She contended in that suit that for certain reasons given she had not released her dower estate. The decree of sale in that case recited that the master's report was approved and confirmed "except that portion thereof relating to dower estate of Charlotte C. Campbell, upon which claim for dower this court does not pass in this case." The property was sold and the report of sale was confirmed and the defendants did not redeem. The Supreme Court held that notwithstanding the recital referred to the court did pass upon the question of dower saying: "The court must have necessarilly passed on that question one way or the other, but by a most singular recital in the decree stated that the court did not pass on it."

If a recital in the decree itself that the court has not passed on a certain matter can not limit what is actually adjudicated, much less can a limitation be effected by a recital in a certificate of evidence outside the decree. But as previously shown the recital in the certificate of evidence did not purport to assert, and did not imply, that the decree was entered by consent, and the most that can be said of

the fact of the striking out the recital in the original draft of the decree the words "that the allegations of the bill are true," is that as several reasons were alleged in the bill why Mrs. Harding was without fault in living separate and apart from her husband, the court did not deem it necessary to find that *all* the allegations were true, but contented itself with finding the ultimate fact in complainant's favor, viz: that she was living separate and apart from her husband without her fault.

That it was not a consent decree is also apparent from the recital of the decree that defendant, Harding, objected and excepted to every finding and every portion thereof (Trans., p. 83), and was careful to have this again recited and certified in the certificate of evidence (*Id.*, 91). The California court erroneously ignored all this. It is further apparent from the opinion of the Supreme Court of Illinois (180 Ill., 481), to which this court, taking judicial notice of the law of Illinois, may refer. That court adopted almost wholly the opinion of the Appellate Court, to which the case was first appealed. It appears from the opinion (pp. 479-8) that George F. Harding assigned as error: "In decreeing that appellee was, at the time of the filing of the bill, living, and ever since had been living, separate and apart from appellant without her fault." Thus, obviously, he did not regard the decree as a consent decree, for a consent decree can not be appealed from. *Armstrong* vs. *Cooper*, 11 Ill., 540; *Knobloch* vs. *Mueller*, 123 Ill., 554; *R. R.* vs. *U. S.*, 113 U. S., 261.

Passing on this assignment of error the Supreme Court of Illinois said in its opinion (p. 503):

> "The statement or stipulation of appellant, signed by himself and his counsel, presented and read in open court and filed as it was, which states, among other

things, viz.: 'I do hereby stipulate that the plaintiff, at the time of the commencement of this suit, was living, and ever since has been living, separate and apart from her husband without her fault, and may take a decree with my consent for such sum as may be reasonable and just for her separate maintenance,' amply justifes the finding of a decree of the court in so far as it relates to her living separate and apart from appellant without her fault."

So the Supreme Court of Illinois did not regard the decree as a consent decree, and in view of this and the previous considerations the contention that the decree was a consent decree is disposed of.

(2.) Even if the decree were a consent decree it would have the same binding effect as though it were a decree in *invitum*. *Knobloch* vs. *Mueller*, 123 Ill., 554, 565; *O'Connell* vs. *Chi. Ter. Ry.*, 184 Ill., 308, 325; *Laguerquist* vs. *Williams*, 74 Ill. App., 17, and other cases referred to below. Indeed, such a decree has an additional claim to be considered final. *Knobloch* vs. *Mueller, supra*. Perhaps a distinction should be made between a decree entered by consent of the defendant and without an agreement between the parties, and a decree entered by agreement of the parties and simply registering such agreement in the decree. Of the latter character it is claimed were the decisions in the two Illinois cases referred to in the opinion of the Supreme Court of California which will be referred to further on.

A decree entered upon an admission of fact, such as defendant in error made in the Illinois case, to-wit, that his wife was living separate and apart from him without her fault, is not a decree by agreement of the parties. If the defendant had filed no answer in the suit, but had made default, the bill would have been taken as confessed, that is

its allegations admitted to be true, and a decree entered upon such confession or admission. But would it be claimed that a decree so entered would not forever conclude the parties upon the matters properly pleaded and embraced in the decree?

In the case of a judgment at law upon a promissory note entered upon a *cognovit*, was it ever heard that such judgment did not conclude the parties to the same extent as though entered after a contest, or if in the course of a trial one of the parties waives proof of and formally admits a fact, is not a judgment in the case if rendered against him binding and conclusive everywhere?

If not, a party, who in the course of a trial made any admission of fact, could afterward, if the judgment were adverse, contend that the judgment was not conclusive, and all matters comprehended therein might be re-litigated, or a defendant believing in the course of a trial that a judgment against him was probable or inevitable, might announce that he would admit the truth of allegations against him, and if such judgment were not conclusive a plaintiff could never have his rights judicially determined if the defendant willed otherwise.

But a judgment rendered upon an admission of fact, or by consent, or by agreement of the parties, is binding and conclusive on the parties as to all issues involved, to the same extent as though rendered upon a contest. *Black on Judg.*, Sec. 705; *N. C. & St. L. Ry.* vs. *U. S.*, 113 U. S., 261; *Burgess* vs. *Seligman*, 107 U. S., 20; *Thomson* vs. *Wooster*, 114 U. S., 104; *Bank of Ga.* vs. *Higginbottom*, 9 Pet., 48; *U. S.* vs. *Parker*, 120 U. S., 89.

The rule applies also to judgments by default. *Harshman* vs. *Knox Co.*, 122 U. S., 306.

Also to judgment on demurrer. *Gould* vs. *R. R.*, 91 U. S., 526; *Bissel* v. *Spring Valley Twp.*, 124 U. S., 225.

In *N. C. & St. L. Ry.*, v. *U. S.*, this court said (p 266):

> "But the insurmountable difficulty is, that the former decree appears upon its face to have been rendered by a consent of the parties, and could not, therefore, be reversed, even on appeal. Courts of chancery generally hold that from a decree by consent, no appeal lies. Although that rule has not prevailed in this court under the terms of the acts of congress regulating its appellate jurisdiction, yet a decree, which appears by the record to have been rendered by consent, is always affirmed, without considering the merits of the case. *A fortiori*, neither party can deny its effect as a bar of a subsequent suit or any claim included in the decree."

In *Burgess* vs. *Seligman*, a suit had been brought against a corporation and a judgment entered by agreement as appeared by the recitals of the judgment with a stipulation that the defendant would be entitled to certain credits, if shown; afterward a suit was brought against the stockholders to collect this judgment and it was contended in that suit that the judgment against the corporation did not establish any debt due plaintiff. But this court held this contention was not sound, saying, (p. 26):

> "The judgment, as against the corporation and its privies, doth establish the debt named therein as due to the plaintiff, but subject to a defeasance for such an amount as might be shown to have been paid to subcontractors and laborers by the corporation. The defendants, as well as the corporation, were at liberty to show any credits, which, by the stipulation, were properly applicable in reduction of the amount of the

judgment. None such were shown, or attempted to be shown. Until such credits were shown the judgment stood valid for the whole amount."

In *Thomson* vs. *Wooster*, a bill having been filed the defendant failed to answer and a decree *pro confesso* was entered up against him. This court said, (p. 110):

> "The defendants are concluded by that decree, so far, at least, as it is supported by the allegations of the bill, taking the same to be true. Being carefully based on these allegations, and not extending beyond them, it can not now be questioned by the defendants unless it is shown to be erroneous by other statements contained in the bill itself. *A confession of facts properly pleaded dispenses, etc, with proof of those facts, and is as effective for the purposes of the suit as if the facts were proved;* and a decree *pro confesso* regards the statements of the bill as confessed."

In *Bank of Georgia* vs. *Higginbottom*, a guardian of certain minors, in order to secure them, confessed judgment in favor of two parties who had no knowledge of the proceedings at the time, but who afterward recognized the trust and accounted under it. Creditors attacked the judgment on the ground of fraud; but this court held the judgment valid in all particulars.

(3.) Such also is the law of the state of Illinois. *O'Connell* vs. *C. T. R. R.*, 184 Ill., 308; *Knoblock* vs. *Mueller*, 123 Ill., 554; *Lagerquist* vs. *Williams*, 74 Ill. App., 17.

In *O'Connell* vs. *C. T. R. R.*, a bill was filed by O'Connell against the railroad company and others to restrain them from building a road across his land. The defendants claimed a right and were attempting to act, under a village ordinance. It appears, however, that at a previous time the village had attempted to build a macadam road across

the land upon the same line, and in a suit brought by the then owner had been perpetually enjoined from so doing; and the court held that the railroad company and its co-defendants were privies with the village and bound by that decree, and said (p. 325):

> "It makes no difference whether the decree in the Martin case was a consent decree or not. Even if entered by consent of the village, it is binding upon those who are in privity with the village."

In *Knoblock* vs. *Mueller* there had been a partition suit by the heirs of a decedent, and by consent of the parties a decree was entered partitioning the land among them according to the laws of descent. Later one of the parties conveyed his interest to a purchaser upon a valid consideration. Still later a will of the decedent was found and probated which devised all of the land to one of the parties to the partition proceedings. He thereupon filed a bill to set aside, as a cloud upon his title, the aforesaid deed, but not asking to reopen the partition decree, or reverse, impeach or alter it, or to procure a rehearing upon the alleged newly discovered matter, but apparently relying upon the nullity or impeachable character of the decree; but the Supreme Court held that the court in which the partition proceedings were had, had jurisdiction of the subject-matter and of the parties and that the decree remained unreversed and in full force and effect and said (page 565):

> "Decrees of courts of chancery, in respect of matters within their jurisdiction, are as binding and conclusive upon the parties and their privies as are judgments at law; and a decree by consent, in an amicable suit, has been held to have an additional claim to be considered final (*Allerson* vs. *Stark*, 9 A. & E., 225).
>
> "Decrees so entered by consent can not be reversed, set aside or impeached by bill of review, or bill in the

nature of a bill of review, except for fraud, unless it be shown that the consent was not, in fact, given or something was inserted as by consent that was not consented to (citing many cases). It is the general doctrine that such a decree is not reversible upon appeal or writ of error, or by bill of review, for error (*Armstrong* vs. *Cooper*, 11 Ill., 540). No exceptions were taken to the decree of partition, or attempt made in the cause in which it is referred to vacate or modify it."

The Supreme Court of California misconceived the Illinois decisions and rule.

The Supreme Court of California cited the cases of *Wadhams* vs. *Gay*, 73 Ill., 415, and *Farwell* vs. *Gt. West. Telegraph Co.*, 161 Ill., 522, as supporting the proposition that a consent decree is not *res judicata*, but misconceived the scope and meaning of those decisions. It construes those decisions as holding that a judgment or decree entered by agreement of the parties is not *res judicata* of the issues involved, while in fact those cases do not so hold but recognize the contrary doctrine.

The case of *Wadhams* vs. *Gay* was a bill filed to carry into effect a previous decree in partition which was incomplete in its provisions in not requiring the execution of deeds. The decree was therein impeached by defendants for fraud. The Supreme Court of Illinois held that upon such bill the court, upon the principle that upon a bill filed for the specific performance of a contract the court will not decree such performance if the contract is inequitable, would examine the decree so sought to be carried into effect, and if such decree was fraudulent or inequitable would refuse to carry it out. The decree sought to be carried out was one in partition. The parties to the decree claimed under a will; one Flagler was entitled under the

will to a certain portion of lands in fee. The parties agreed upon the respective interests and the agreement was reduced to writing, it being further agreed that as minors were interested a suit should be brought to effect the partition. The bill was filed by one of the parties and the copy of the statement of the respective interests agreed upon was attached to the bill, except that a portion of the statement in connection with the property set off to Flagler was "subject to the covenants, conditions, and reversion of the will," was omitted. After the agreement was made Flagler departed for his home in New York leaving the parties here to carry the agreement into execution by suit. The bill for partition, however, alleged that Flagler's interest was a life estate instead of an estate in fee, contrary to the agreement, and certain attorneys were requested by the parties conducting the suit to file an answer for Flagler, admitting the allegations of the bill, and consenting to a decree accordingly which gave Flagler but a life interest, which they did. Flagler was not advised of this fact until after the decree had been entered and the term of court passed. It was to enforce this decree by requiring the execution of deeds that the bill was filed in *Wadhams* vs. *Gay*. The court refused to enforce the decree on account of the injustice to Flagler, and the further ground that he *never in fact* consented to it. The court held (p. 426):

> "An attorney has no *implied authority* to compromise or give up any right of his client, *nor to consent to* a judgment against his clients."

And said further (p. 428):

> "We are entirely satisfied that this consent decree declares a wrong definition of the rights of Charles, on the mistaken supposition that he was consenting thereto, while, in fact, neither he nor his counsel in-

tended to assent to any such thing; but that he intended to have and retain all his rights under the will, and never consented or intended to give up any portion thereof to his children. Any such consent or intention is an imputed one to him, and not an actual one. * * *

"Arriving, as we do now, to the conclusion that, upon the evidence in this case, as matter of fact, this consent decree does not rest upon any basis of real right and equity, we come to the inquiry whether a court of equity should lend its aid in carrying it into execution, or give relief which would be tantamount to that."

The court then held that under the circumstances it was not bound to enforce the decree, citing authorities at length in support of its position. It was urged that the decree was *res adjudicata* but in regard to that the court said (p. 435):

"We do not regard that it militates with the doctrine of the conclusive effect of what is *res adjudicata*, that where there is an incomplete decree and it is ineffective for want of the provision of any means for its execution, and an application is made to a court of equity to supply the imperfection so as to render the decree effective, that then it is admissible to look at the real nature and character of the decree, as it may appear in the light of surrounding circumstances, for the purpose of determining whether there is such an equitable ground for action as will move a court of equity to interpose. Equity will penetrate beyond the covering of form, and look at the substance of a transaction, and treat it as it really and in essence is, however it may seem."

The court incidentally reviews certain authorities upon the effect of a consent decree and it is upon these citations

that the Supreme Court of California bases its assertion that the Illinois court held in this case that a consent judgment is not *res adjudicata.*

It is apparent, however, from what has already been said that this discussion was *dictum* and not applicable to the case, as the court held that the decree in question was, in fact, not a consent decree, saying (page 436), in addition to what has already been quoted:

> "We are satisfied that these elements are not here present; that the supposed consent decree was made without any actual consent, and contrary to intention."

The only principle decided was that the court, upon a bill filed to enforce a decree, would not enforce that decree if it were fraudulent or inequitable.

The case of *Farwell* vs. *G. West. Telegraph Co.*, 161 Ill., 522, also cited by the Supreme Court of California to sustain the proposition that the Illinois courts did not give to a consent decree the effect of an adjudication, does not support that proposition, but holds only that equity has jurisdiction to grant relief against judgments and decrees obtained by fraud. In that case, a bill was filed by the stockholders of a corporation for certain relief, including the setting aside of a decree on a cross-bill, allowing a large claim in favor of one Reeve in a suit, already pending, involving the same matters, and to restrain proceedings in that suit against stockholders to enforce that and other fraudulent claims. A receiver had been appointed in the former suit, in which George F. Harding represented the corporation, being also a creditor thereof. The attorney for the receiver held by assignment, and otherwise, large claims against the corporation. A written agreement, which the court held to be a part of a conspiracy to defraud the corporation and its creditors, was

entered into by George F. Harding, the attorney for the receiver, and others, to secure the allowance and collection of certain claims by proceedings against the stockholders, and to appropriate the assets of the corporation. In pursuance of this agreement, by an arrangement between Harding, pretending to represent the corporation, and the attorney for the receiver, a decree was entered upon a cross-bill, filed by Reeve, finding a certain amount due to Reeve, and the property was sold under this decree and bought in by, or for, the parties held to be conspirators. It was contended that said decree was *res judicata*, as the stockholders were represented by the corporation which appeared by Harding, and by the receiver which appeared by its attorney; but the court held that instead of Harding and the receiver's attorney representing their respective clients they were really representing themselves and perpetrating a fraud upon the stockholders and creditors. The court said in its opinion (page 581):

> "The efforts made by this corporation to defeat Reeve's claim, and its effort to set aside the claims of Gage, Hilton and the bank, had been rendered nugatory by its own counsel, Harding, in conjunction with Sutherland, who had, from the inception of this litigation been constantly opposed to the corporation."

The court held that equity had jurisdiction to set aside judgments and decrees obtained by fraud, and cited *Johnson* vs. *Waters*, 111 U. S., 640, thus placing itself on the doctrine held by this court. The court then said (pp. 601-2):

> "The hearing on the Reeve cross-bill related to a matter that it had been agreed should not be contested between Sutherland and Harding—one representing Reeve, the other accepting notice as and for the corporation. Their agreement was to accomplish that

end. The confirmation of the master's report was by and in accordance with that previous agreement, and there was not a real controversy of a real interest by real parties on real evidence, but a proceeding to mislead master and judge alike, and induce what was not a real report or a real decree. It was such fraud that the decree of confirmation of the Reeve claim must be set aside and the report disapproved. It was, in effect, a finding by the master, and a decree, by consent, and they were so nearly the mere acts of the parties that it can not be said the facts or law were judicially ascertained."

So this case holds only the universal doctrine that a judgment or decree obtained by fraud can be set aside in equity by proper proceedings for that purpose. In the Illinois suit here in question not only was there here no contention that the decree was fraudulent or inequitable, but it was recognized as entitled to credit (Trans., pp. 23-24, 108-10), and Harding said to the court in the case at bar that he stood by his admission ("stipulation" he erroneously called it) made in the Illinois case (*Id.*, p. 95). The doctrine in Illinois is, as already shown by cases previously cited, the general doctrine obtaining in almost all of the courts, that a judgment or decree entered by consent is as binding and conclusive between the parties as one rendered in *invitum*.

It is not, however, necessary to resort to the rule that, under the circumstances, this court may take judicial notice of the laws of Illinois.

The law in California is that, in the absence of proof of the law of a sister state, the courts of California will presume that law to be the same as the law of California. *Shumway* vs. *Leskey*, 67 Cal., 458.

The presumption is even extended to the statute law of California and not limited to the common law.

Cavallaro vs. *Texas, etc., R. R.*, 110 Cal., 348.

Applying the law of California, a judgment by stipulation is conclusive as to all matters within the issues.

McCreery vs. *Fuller*, 63 Cal., 30.

Partridge vs. *Shepard*, 71 Cal., 470.

It follows from whichever course of reasoning is adopted that the question in issue in the suit in California had been adjudicated in the Circuit Court of Cook County, Illinois, whose decision had been affirmed by the Supreme Court of Illinois, and that the effect of such decree in Illinois was to make the adjudication everywhere and forever binding and conclusive upon the parties; that the Superior Court of San Diego County and the Supreme Court of California refused to give to the Illinois decree such faith and credit as it had by law and usage in the courts of the State of Illinois.

IV.

The State of California never was the matrimonial domicile of the parties and, therefore, the courts of California had no jurisdiction of their matrimonial status, and the decree of the California court was consequently for this reason also, erroneous.

The record shows that the parties were married in Illinois and lived there together until they separated early in February, 1890(Trans., pp. 26, 27, 39, 44, 45, 54). Harding does not claim to have made any change in his residence until May, 1895, and then lived with his sister in San Diego, California, who took care of the house for him, as he was without a wife in California (*Id.* 27). Harding lived in

Illinois while testimony was taken in the Illinois case (*Id.* 38; testimony of Beatrice).

There was no evidence showing, or tending to show, that California or any other state than Illinois, ever had been the domicile of Mrs. Harding or, in other words, that it had been the matrimonial domicile of the parties. The rule applies then that the fact that her residence, the status and the matrimonial domicile remained in Illinois is to be presumed (Cal. Civil Code of Proc., Sec. 1963, Par. 32).

While the court had jurisdiction of the parties, that, did not give the court jurisdiction of the subject-matter, that is the *status* of the parties. A suit for divorce is not merely a suit in *personam* but is also a proceeding *in rem.* The *status* of the parties is the *res.* In a proceeding *in rem* the jurisdiction of the court over the *res* must affirmatively appear. It appears from the record that the matrimonial *status* was created in the State of Illinois and under its laws and the *res* was thus created and established in that state. This *status* or *res* thus created there could not be removed to any other state without the act of both parties. It not appearing that this *status* had ever been removed to California and within the jurisdiction of its courts, it does not appear that the court had jurisdiction of the subject-matter of the suit. In a proceeding *in rem* the court will not presume that the *res* exists within the jurisdiction of the court, but it must be averred and proved that it lies within the jurisdiction, and upon the failure of such proof it will not appear, nor will it be presumed, that the court had jurisdiction of such subject-matter.

This court has not as yet directly passed upon this point, but in several cases it has specially reserved that question. *Bell* vs. *Bell*, 181 U. S., 175; *Streitwolf* vs. *Streitwolf*, 181 U. S., 179; *Andrews* vs. *Andrews*, 188 U. S., 14, 40.

The evidence in the case shows that it is not pretended or claimed that Mrs. Harding ever had a domicile, or ever resided in the State of California or, in other words, that California was ever the matrimonial domicile of the parties. That, on the contrary, the matrimonial domicile was never elsewhere than in the State of Illinois. It is, therefore, submitted that the courts of California had not, and never had jurisdiction of the *status*—the *res*—involved in a suit between these parties for divorce. The court will not be burdened with an argument upon this question, but it is submitted that the proposition stated involves the correct legal doctrine.

Respectfully submitted,

JOHN S. MILLER,
PLINY B. SMITH,
Attorneys for Plaintiff in Error.

FILE COPY.

Office Supreme Court U. S.
FILED
APR 22 1905
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 222.

ADELAIDE M. HARDING, PLAINTIFF IN ERROR,

v.

GEORGE F. HARDING, DEFENDANT IN ERROR.

ERROR TO SUPREME COURT OF CALIFORNIA.

ADDITIONAL AUTHORITIES CITED BY PLAINTIFF IN ERROR.

As to the identity of the issues:

Miller v. Miller, 150 Mass., 111.

Plaintiff in error did not waive the benefit of the Illinois decree by introducing other evidence in the California suit.

See last paragraph in opinion in—

Donnell v. Wright, 147 Mo., 639.

See also:

Martin *v.* R. R., 103 N. Y., 626.

Barker *v.* R. R., 126 Mo., 143.

Other defenses than *res adjudicata* pleaded, but plea of *res adjudicata*, nevertheless, sustained.

Stockton v. Ford, 18 How., 418.

On jurisdiction:

Oxley Stair Co. *v.* Butler Co., 166 U. S., 657.
Bridge Prop'rs *v.* Hoboken Co., 1 Wall., 116.
Green Bay, &c., Co. *v.* Patten Paper Co., 172 U. S., 58.
Tex. & Pac. Ry. *v.* Sou. Pac. Co., 137 U. S., 48.

That the Illinois decree is final, see Black on Judgments, section 509, middle of section:

"Where a decree in equity passes upon the issues between the parties and finally determines their rights in respect to the main facts in controversy, or the principal object of the action, though it orders a reference as to specific items, or *reserves a right to apply for further relief*, or continues the cause for such further action as may prove to be necessary, it is conclusive as to the matters judicially and finally determined, although the reserved or postponed questions may still be open."

JOHN S. MILLER,
PLINY B. SMITH,
Counsel for Plaintiff in Error.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1904.

ADELAIDE M. HARDING,
Plaintiff in Error,
vs.
GEORGE F. HARDING,
Defendant in Error.

Error to Supreme Court of California.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

Statement and Synopsis of Essential Facts, Questions Raised and Points Argued.

Statement and synopsis of essential facts, questions raised and points argued.

I.

Complaint.

The complaint (Trans., 1), filed August 31, 1897, contains three allegations, touching, respectively:

(1) The marriage of the parties in 1855.

(2) The residence of the husband in California, in San Diego County, since May 15, 1895.

(3) The willful desertion of the wife without just cause, in or about and ever since February, 1890. The complaint prays for a decree of divorce.

II.

Answer.

The answer of Adelaide M. Harding:

(1) Admits the allegation of the complaint touching marriage.

(2) Denies the allegation touching residence.

(3) Denies the allegations touching desertion. (Trans., 2-3.)

(4) Sets up orders and decree of the Circuit Court of Cook County, Illinois, in her maintenance suit (*Id.*, 3-19), and stipulation filed therein by the husband on January 3, 1893 (*Id.*, 8), and pleads the same as "a bar to the complaint" (*Id.*, 18), *alleging that "said proceedings and decree," "from and after the filing of said statement,"* "on the 3d day of January, 1893," "*proceeded* upon said statement," *"and the said court,* * * * in entering the said decree, *proceeded upon the said statement* * * * in finding and adjudging in said decree * * * that this defendant was, * * * on the 3d day of February, 1890, and ever since had been, and then still was, living separate and apart from the said George F. Harding, without her fault." (*Id.*, 18.)

The *stipulation* thus confessed to be the basis on which the decree proceeded, "and *the court proceeded,"* is set forth and shown under Points IX and X *post,* to make said decree a "consent decree" only, and not an *adjudication;* hence not a bar or estoppel, even had the issues in the two cases been identical; and not being an adjudication, *no federal question arises, and this court has no jurisdiction of this cause.*

Supplemental Answer filed January 4, 1901.
(Trans., 19-20.)

Adopts prior answer (Trans., 19), thereby repleading *decree per stipulation of January* 3, 1893, as a bar; *alleging payment of large sums of money by* George F. Harding to said Adelaide M. Harding, *in pursuance of and as directed by the said* decree. (Trans., 22.)

Also sets up same decree as modified by decree entered December 8, 1899, reducing alimony allowances, and pleads said decree, so modified, as a bar and estoppel. (Trans., 22.)

The said modified decree of December 8, 1899, so pleaded as a bar, distinctly provides that said prior decree of July 26, 1897, so far as not inconsistent therewith, and as so modified, stands in full force, thus clearly manifesting that the said decree, as well after as before its said modification, was a *decree per stipulation of January* 3, 1893.

Said modified decree further provided (Trans., 21) that such alteration thereof, "in the allowance of alimony, may be made by future decree or decrees as shall or may be found to be just and reasonable," just as the prior decree of July 26, 1897 (Trans., 17), limited the payment of the allowances therein *"until the further order of the court,"* and provided (Trans., 18), "that either party be at liberty to apply to the court as circumstances may require," thus clearly manifesting *that neither said decree nor said decree as so modified was a* **final** decree, if any decree in a separate maintenance suit ever is final in the sense of being irrevocable and putting an end to the suit itself.

That said decree and said decree as modified was not

in said sense final, irrevocable and immutable, but that the allowances thereby made were subject to alteration, reduction and even extinguishment, is established by an overwhelming weight of authority.

Audubon v. *Shufeldt,* 181 U. S., 575.
Welty v. *Welty,* 195 Ill., 345.
Cutler v. *Cutler,* 88 Ill. App., 464.

This raises a serious question as to whether any decree so alterable, revocable, interlocutory or non-final in its nature can be in any case successfully pleaded as a bar or estoppel.

How can any other court know, when called upon to sustain such a decree as a bar or estoppel, whether such decree is not at that very time being annulled, or has not already been, or will not the next day or hour be annulled by the court which entered it?

The same authorities last above cited uphold the *exclusive* jurisdiction of the court decreeing maintenance allowances to vacate or alter them.

This doctrine may have been and probably was in the mind of the learned Chancellor in California when, in his second conclusion of law (Trans., 24), he held "that *this* court, in *this* case, has no jurisdiction to limit or in any way affect the decree of the Circuit Court of Cook County, Illinois," thus leaving *that* court in *that* case to limit, change or revoke its own decree in view of any facts brought to its attention calling for such change or revocation, such, for instance, as misconduct of the wife, *divorce* for desertion, or other cause, subject only to the decision of higher courts on appeal, by either party, from the order granting or refusing such change or revocation.

The question what effect the divorce decree would or

should have on the separate maintenance decree, and whether the latter should stand or fall, in whole or part, was primarily a question for the court entering said maintenance decree, and afterwards, on appeal therefrom, for the courts to which such appeal or appeals might go.

It was not a question for the California court, and was declined by the language of its second conclusion of law.

The modified decree of December 8, 1899, *has never,* since its entry by the Circuit Court, *been before the Supreme Court of Illinois,* hence the latter court has never passed, one way or the other, on the question of whether *that* decree was or was not a consent decree, "proceeding" and based upon the stipulation of January 3, 1893, as it was clearly held to be by the Circuit Court's own prior order of reference (Trans., 79), by its certificate of evidence (Trans., 91), and by its refusal and non-insertion in its prior decree (Trans., 16) of the requested finding that the allegations of the bill of complaint were true.

In deciding that the decree of July 26, 1897, as modified by the decree of December 8, 1899, was a "consent decree," the Supreme Court of California decided only what the Circuit Court in Illinois had evidently decided.

III.

Stipulations, in California divorce suit, whereby each party consents that the other party may read in evidence in said suit any testimony of witnesses in Illinois maintenance suit contained in printed abstract of record thereof. (Trans., 37.)

It is contended that by these stipulations, and by the testimony read under them by both parties, without objection, from the abstract of the Illinois record, the supposed estoppel, if any, of Illinois maintenance decree was waived, and the issues in the divorce suit were by mutual consent thrown open for trial, and actually tried upon their merits, and decree for divorce entered and affirmed upon the mere weight of the evidence without reference to any federal question. Hence this court has no jurisdiction of this cause.

IV.

Testimony in maintenance suit read by both parties, without objection, at the hearing of divorce suit, pursuant to above stipulations. (Trans., 38-9, 86-90 and 93.) The said estoppel, if any, was thereby waived and federal question eliminated, depriving this court of jurisdiction of this suit.

V.

Oral testimony introduced by both parties, without objection, at hearing of divorce suit on issues therein, including domicile, willful desertion, etc. Introduction of said oral testimony by consent and without objection operated as a waiver of the supposed estoppel, and led to a trial upon the merits.

See George F. Harding's oral testimony (Trans., 26-34; also 39-43 and 93-95). Other oral testimony at said hearing (*Id.*, 25-26; 34-36). Also Victor M. Harding's oral testimony, as witness for defendant (*Id.*, 90-91).

VI.

Findings of facts.

The court found:

(1) That parties were married in 1855, as stated in complaint, and "cohabited as husband and wife until about the 1st of February, 1890." (*Id.*, 22-23.)

(2) That the husband was and had been since May 15, 1895, a *bona fide* resident of San Diego County, California, as stated in complaint. (*Id.*, 23.)

(3) That the wife willfully deserted her husband on or about February 1, 1890, without just cause, and ever since has so continued willfully and without just cause. (*Id.*, 23.)

(4) *That all allegations in the complaint are true,* and that all the allegations, averments and denials in conflict with the allegations in complaint, contained in answer and supplemental answer of defendant, are untrue. (*Id.*, 23.)

(5) "That the Circuit Court of Cook County, Illinois, a court of competent jurisdiction, in a proceeding for separate maintenance by defendant against plaintiff, has entered decrees for allowances of alimony against plaintiff, which are allowances adjudged by the Supreme Court of Illinois to be equal to the present ability of the estate of the husband, with rights reserved to wife to increase the same when faculties of the husband may be decreed to warrant such increase." (*Id.*, 23.)

These findings "included *all the finding of all the probative facts* necessary to the finding of the *ultimate* facts. *Adams* v. *Crawford*, 116 Cal., 495.

VII.

Conclusions of law.

The court finds:

(1) That plaintiff is entitled to a decree of divorce. (*Id.*, 23.)

(2) That this court in this case has no jurisdiction to limit or in any way affect the Illinois decree adjudging a separate maintenance to defendant. (*Id.*, 24.)

VIII.

Decree of divorce.

Recites and finds that it "appears" from the said findings of facts and conclusions of law "that all the material allegations of the complaint are sustained by the testimony" (*Id.*, 24), "wherefore" the court decrees *dissolution of the marriage* (*Id.*, 24).

This demonstrates that the court regarded its two conclusions of law as perfectly compatible with each other and with the absolute divorce decreed.

The *second* conclusion of law was entirely needless except, perhaps, as an explicit precautionary disclaimer that by the decree entered the court did intentionally, or in fact, or in effect, deny to the maintenance decree any faith, credit and effect to which it was entitled. As to

what faith, credit and effect it was or might be entitled to, no conclusion was announced; but whatever the same might be, the court disavowed all jurisdiction to limit or affect it, leaving the consequences of the two decrees to take care of themselves under and according to settled legal principles, and the law of the land.

IX.

Opinion of Supreme Court of California affirming decree of divorce. (Trans., 107-111.)

Holds, inter alia:

(1) That the lower court's determination as to the *bona fides* of complainant's residence in California was a "determination of a question of fact upon conflicting evidence," which, under California practice and decisions cited, "*here cannot be disturbed.*"

(2) And that "the same rule must also be applied to the question of the sufficiency of the evidence" (as to desertion).

"It was in sharp conflict, and upon either side was the corroborating evidence of the children. * * * The determination of the trial court under these circumstances, that the defendant had been guilty of desertion, cannot here be disturbed." (Transcript, 108.)

(3) That the question of defendant's alleged desertion was still open to inquiry, and was not foreclosed by the maintenance decree of the Illinois court, and that said decree did not operate as an *estoppel.*

(4) That the separate maintenance decree was entered "*by consent* and as the *result of a compromise.*"

That the court, in entering it, did not, after argument and consideration, come to a decision on a *contested matter;* and exercised no judicial function upon the subject, but merely an administrative function by *recording what had been agreed to by the parties.*

That consequently the decree could not be considered as a *judicum,* nor as *res judicata.*

That from and after January 3, 1893, when Mr. Harding's stipulation was filed in the maintenance suit, *the issue as to whether his wife was living apart without fault on her part, was entirely eliminated* from the case and *there was to be no finding or trial of such an issue;* hence no *adjudication.* (Trans., 110.)

(5) That in his said stipulation the husband alleged his ability to make good his defense, if the case must be tried, and "asserted that it seemed to be in the interest of peace, and *to end the litigation, to consent to a decree* for such sum as the court might find to be equitable," and that she (Mrs. Harding) "may *take a decree with my consent* for such sum," etc. (Trans., 109.)

(6) That in pursuance of this stipulation the court made its order of reference to the master, quoting said order as set forth in transcript (page 79) as follows: "To take evidence and report the same, with his conclusions upon the issue in question *as to the amount or amounts,* if any, to be allowed complainant and to be decreed to be paid by the defendant to complainant for alimony and upon other issues herein *than the question as to whether complainant, at the time of the commencement of this action, was, and since that time has been, and is, living separate and apart from her husband, the defendant, without her fault;* said defendant having admitted upon the record herein as by his written stipulation filed herein on

January 3, 1893, and *for the purpose of this trial only,* that the complainant was at the time of the commencement of this suit and since that time has been and is living separate and apart from her said husband without her fault." (Trans., 109.)

N. B.—This order was an *adjudication* by the court, that *the stipulation* so filed on January 3, 1893, was *made, accepted, and acted upon by the parties and the court* upon the express understanding that it was not thereby stipulated for the purpose of any other suit or even for the purpose of any other trial of that suit than *"this trial only,"* that the wife was or had been living apart from her husband without her fault.

It was furthermore an *adjudication* and *direction* or *command* to the master *that no evidence was to be taken or reported* by him with or without conclusions *as to whether she was so living apart without her fault;* but that evidence should be taken and reported by the master with his conclusions upon the question of the amount of alimony to be allowed.

This excludes all possible inferences that testimony taken and reported on *"other"* issues, such as *custody* and *maintenance* of children (Decree, Trans., 15), was testimony reported or considered by the master or the court on the question of such living apart.

(7) The opinion *holds* that the *litigation* which followed "attended *the fixing of the amount.*" (Trans., 109.)

(8) That the filing of a *"certificate of evidence"* was *provided for by the decree* entered July 26, 1897. (See Trans., 83.) That said "certificate of evidence," *signed and sealed* by the judge entering the decree, was *filed,* and thereby, by its terms and those of the decree itself,

was made a *part of the record* in said cause (Trans., page 92), and (as held in *Ensminger* v. *Powers,* 108 U. S., 292, and *Rawson* v. *Rawson,* 37 Ill. App., 495, cited in the opinion), *"must have the same effect as if* the narration it contains of what occurred were *incorporated in the body of the decree."*

The opinion quotes from said certificate of evidence the following, which appears in transcript (page 91):

> "In settling the terms of said decree, the attorney for the complainant requested the court to find in such decree that the allegations in the said bill of complaint as amended herein are true; but the defendant objected to such finding on the ground of the paper filed herein on January 3, 1893, and presented to the court by the defendant, and the contents thereof, and on the further ground that such finding was not warranted by the proof; and **the court stated that it, the court, had not considered and passed upon that question** *for it, the court, regarded it as unnecessary in view of the said paper of defendant, filed herein January 3, 1893;* and **thereupon such finding was not inserted in such decree."**

(9) That no more force is to be allowed to the judgment of a sister state, when raised as a bar by way of estoppel in an action between the parties in another state, than would be accorded to that judgment by the courts of the state which rendered it.

(10) That "by the *rule of decision* in the courts of *Illinois* a *consent judgment* operates to estop the parties *no further than is necessary to secure the enforcement of the judgment or decree in the particular matter in which the consent judgment was given,* and it *is not a bar to any inquiry into the same question* in any other action," cit-*Wadhams* v. *Gay,* 73 Ill., 417, and other cases. (Trans., 110.)

X.

Stipulation filed January 3, 1893, in maintenance suit.

This appears in proof (Trans., 72), and also on page 8, where it is embodied in the wife's answer to the husband's complaint for divorce, and on the next page *is pleaded by her as a bar* to said complaint.

While for the purpose of fortifying the opinion of the Supreme Court of California as to the character and effect of said stipulation, we invite attention to it as a whole, we need only here quote and emphasize the following passages thereof:

"* * * *Whatever the result of this case, it would be my duty, as I understand it, to give her further support; and this I should do, whatever the result of this case, and without reference to whether she can exact it or not.*"

"*I am confident of making good my defense if the case must be tried.*"

"Hence it seems to me to be wise in the interest of my family and of peace, if I can *put an end to this litigation* to do so *by consenting to a decree* giving her for separate maintenance such a sum as the court may find to be just and equitable," etc.

"*Hence I give* **my consent that a decree for separate maintenance shall be entered** in favor of the plaintiff, **without a finding or trial of issue in this case.**"

"I further offer and stand ready to make such other or further or different stipulation * * * as may, in the opinion of your Honor, be required to make it **unnecessary** *for the court* **to hear and decide** *upon the issues and evidence in this case,*" etc.

"I do hereby *stipulate that* the *plaintiff* * * * *may take a decree with my consent* for such sum," etc.

It would seem clear enough from the very contents of such a stipulation that it could not, nor could any decree based on it, operate as an estoppel.

As held in 39 La. Ann'l, 443, in the case entitled "Succession of Harris":

> "A party is not stopped by judicial declaration made for the purpose of simplifying proceedings and for the common interest and convenience of all parties concerned and which have neither misled nor damaged any one."

It has already been sufficiently shown that Mrs. Harding was neither misled nor damaged by the stipulation upon which her decree "proceeded," giving her $6,400 per annum for a long series of years, and she admitted in her answer in California (Trans., 22) that she had received from her husband *large sums of money* "in pursuance of and as directed by the said decree."

Applying to this case the doctrine and substantially the very language of this court in *Gay* v. *Parpart*, 106 U. S., 679: "It is impossible to see how the doctrine of estoppel can operate in favor of" plaintiff in error.

The above case in 39 La. Ann'l, 443, quotes with approval the following from Greenleaf on Evidence, Section 204:

> "It is, in such cases, material to consider whether the admission is made independently, and *because it is true*, or is *merely conventional, entered into* between the parties *from other causes than a conviction of its truth*, and only as a convenient assumption *for the particular purpose in hand.*"

XI.

The master's report, made in strict obedience to the order of reference (Trans., 79), reported the testimony and his conclusions as to amount of alimony only, and no testimony or conclusions upon the question of the wife's living apart from her husband without her fault.

This appears from said report as set forth in her answer to the divorce complaint. (Trans., 15.)

Hence, when the case came before the court upon said master's report and exceptions of both sides thereto—which were overruled—the finding of the court in the decree (Trans., 16) "that the complainant was and had been living apart from her husband without her fault," was manifestly not a finding upon evidence, but upon the basis of the stipulation of January 3, 1893, as recited in the certificate of evidence (Trans., 91), and as claimed, indeed, by the defendant herself in the next to the last paragraph of her said answer. (Trans., 18.)

It is further apparent from said decree (Trans., 16) that the additional evidence which the court heard related to the reported amount of alimony, from which in consequence of such additional evidence, the court made the reduction mentioned on said page 16.

To suppose that the court did not make the stipulation of January 3, 1893, the basis of the finding of its decree that the wife was and had been living separate and apart from her husband without her fault, is to suppose that the court made such finding, not only upon no evidence whatever, but after the giving and taking of evidence on that subject before the master had been ex-

plicitly forbidden by the court's own order of reference. (Trans., 79.)

Such a supposition would not merely make the court do violence to its said order, and to the stipulation thereby recognized, but would amount to an accusation that the court had condemned the defendant without a hearing, "contrary to the first principles of the social compact and of the right administration of justice." (*McVeigh* v. *U. S.*, 11 Wall., 267.)

"*A sentence of a court pronounced against a party without hearing him*, or giving him an opportunity to be heard, *is* **not a judicial determination** *of his rights*, **and is not entitled to respect in any other tribunal.**"

Windsor v. *McVeigh*, 93 U. S., 274.

XII.

The decree, and the only one, pleaded by the defendant, Mrs. Harding, as an estoppel, is the one copied in quotation marks and set forth and sworn to as correct in her sworn answer on pages 15 to 19 of the transcript.

That decree does not contain the recital or finding that the allegations of the bill of complaint as amended are true, which finding, as already shown by the certificate of evidence (Trans., 91-92) was not inserted in said decree notwithstanding Mrs. Harding's counsel had requested that it should be.

The finding "that the equities of this cause are with the complainant"— contained, as it is, in a decree shown and pleaded as one entered, not upon evidence, but by

stipulation—simply signified that the decree followed the stipulation and accorded to her as her equity under it the separate maintenance which rested upon the stipulation as its only basis.

Furthermore, the answer of Mrs. Harding to the divorce complaint (Trans.. 14) urges the claim that *the order of reference* to the master (Trans., 79) *was entered upon the said stipulation of January* 3, 1893. She calls it a "statement" and "admission," but, by the *nunc pro tunc order* of April 15, 1893, entered as of May 15, 1893, long before the decree of July 26, 1893, the words *"and now admitting in open court"* were stricken out, and the following words substituted: "as by his written stipulation filed herein on January 3, 1893, and for the purpose of this trial only." (Trans., 15, also 79.)

There was no occasion for the decree of July 26, 1897, to recite that its finding of complainant's living apart without her fault was based solely upon said stipulation of January 3, 1893, as that fact was already *adjudicated* by the court's said prior order of reference, and a repetition of such adjudication was needless. The certificate of evidence, read as part of the decree, explicitly recites that no evidence upon the question was considered or passed upon, because of the said stipulation.

XII.

NO ESTOPPEL.

For reasons which follow, neither the decree, the modified decree, nor the stipulation, nor all combined, created a bar or estoppel against the prosecution of the California divorce suit, nor against proving therein the truth of the charge of willful desertion, nor against proving any fact whatever essential or material to the establishment of said charge.

(1) The maintenance decree, with parts thereof pleaded and relied on as a bar, viz., *the supposed findings* and judgment therein, that the wife was living apart from her husband without her fault, was not an *adjudication* or *res adjudicata* upon a *contested matter,* but *was the result of a compromise* and was *entered by consent* and based exclusively on the stipulation of January 3, 1893.

(2) Said stipulation insisted that plaintiff's charges were not true and as confidently insisted on the merits of husband's defense and his ability to make it good. Consequently, the stipulation to the effect that she was living apart without her fault is to be treated only *as conventional,* not as a statement made because it was true, or from any conviction of its truth, but only as a convenient assumption for the purpose in hand, the ending of litigation and adjustment of family differences; hence neither the stipulation nor decree based on it can be held as an estoppel.

Greenleaf, Ev., Sec. 204.

39 La. Ann., 443, Succession of Harris.

(3) Said stipulation was *not given as an admission to be used in place of evidence* upon the trial of an issue remaining for trial, but *to put an end to the litigation by putting* **that issue out of the case entirely** by allowing the plaintiff *to take a decree* **by consent, without a finding or trial,** and in order **"to make it unnecessary** for the court **to hear and decide upon the issues and evidence."**

(4) The decree, based on such stipulation, cannot operate as an estoppel, because if not entered solely under and according to said stipulation it was entered **upon an issue no longer in the case, without trial, without evidence, all evidence being prohibited and excluded by the order of reference, and none considered and passed upon by the Master or the court.**

The *decree,* if so entered, was *not a judicial determination,* but absolutely *void,* and not *entitled to respect in any other tribunal,* as an estoppel or otherwise.

Windsor v. *McVeigh,* 93 U. S., 274.

(5) Plaintiff in error *is estopped from pleading estoppel* as against the stipulation and stipulated decree thereon, for the reason that *she cannot repudiate the terms of said stipulation after receiving the great advantages and large sums of money which she received solely by the terms and provisions thereof.*

(6) The defense of *estoppel* is not available to plaintiff in error against the decree by stipulation under which she took vast advantages and suffered no disadvantage whatever.

Gay v. *Parport,* 106 U. S., 679.

(7) Estoppel is unavailable to her, because she went into a trial of the divorce case on its merits and stipulated

(Trans., 37) for the introduction of evidence by both parties, both of whom introduced evidence *accordingly* on the issues of willful desertion, domicile and other matters alleged, in the complaint and denied in the answer.

(8) The maintenance decree cannot be relied on as an estoppel because it is not, in its nature, final, absolute and unalterable, but is subject at any time to be changed, reduced, revoked and extinguished by the court having jurisdiction of the cause in which the same was entered. Not only is this power of alteration and revocation expressly reserved in the decree itself, but independently of that, by reason of the nature of such decrees and causes, the same power of alteration and revocation inheres in the court according to the general current of authority.

Audubon v. *Shufeldt*, 181 U. S., 575.
Welty v. *Welty*, 191 Ill., 340.
Cutler v. *Cutler*, 88 Ill. App., 464.

Therefore the answer of Mrs. Harding, wherein she pleads said maintenance decree in bar of this suit, setting up that said decree is "unimpeachable and irreversible at the suit or on the contention of said George F. Harding" (Trans., 19), is incorrect.

(9) **The issues in the two cases were not identical; hence there was no estoppel.**

"Willful desertion" under the Civil Code of California, Section 92, is ground for a divorce.

Section 95 defines "willful desertion" to be "the voluntary separation of one of the married parties from the other with intent to desert," and Section 100 provides that "absence or separation proper in itself becomes desertion whenever the intent to desert is fixed during such absence or separation."

The issue raised by the pleadings in the divorce suit in the trial court was simply and solely whether Mrs. Harding was guilty or not guilty of "willful desertion" within the meaning of said sections of the said Civil Code.

The issue in the Illinois separate maintenance suit, which *might have been litigated and judicially determined* therein, *but was not,* because distinctly eliminated as an issue, was whether, within the meaning of the Illinois statute, Mrs. Harding was living apart from her husband without her fault.

That there is no identity between the question at issue in the divorce suit and the issue, even had it not been eliminated, in the maintenance suit, seems almost too self-evident to require discussion or citation of authorities.

As held in *Wahle* v. *Wahle,* 71 Ill., 513, with reference to a bill for divorce for desertion, and a bill for separate maintenance:

> "It cannot be pretended that the object of the bills and the relief sought is, in each case, the same. Nor will the same evidence necessarily determine both cases."

The court then proceeded to state the difference in the proof required in the cases respectively, and clearly demonstrated that the issues were not the same in the two suits.

This conclusion was followed and approved in the case of *Umlauf* v. *Umlauf,* 117 Ill., 584, where the court says:

> "The question then recurs, is the proposition that Mrs. Umlauf lived separate from her husband 'without her fault' identical with the proposition that 'she willfully deserted and absented herself from him without any reasonable cause'? We are of the opinion *they differ in several essential particulars.* The element of *willfulness* contained in the latter proposition is clearly not to be found in the former. Nor

> do we regard the two expressions, 'without fault' and 'without reasonable cause' either in a popular or legal sense as equivalent terms."

On page 585 the court, referring to the decree against the wife in her separate maintenance suit, said:

> "The only question it conclusively settles is, that her living apart from her husband was not without her fault."

In the *Umlauf* case the husband relied on the supposed estoppel; in the *Wahle* case it was invoked by the wife. That was held, in the *Umlauf* case (117 Ill., page 587), to be the only difference between them. The estoppels were *defeated in both cases and for the same reason,* viz., that the *issues* in the divorce suit and in the separate maintenance suit were *not identical;* that it was "not sufficient that the question arising in subsequent litigations is identical with the one decided in *some* respects only; it must be so in *all* respects. If, therefore, there is an element in one of the questions, which is not contained in the other, the rule (of estoppel) does not apply, for the obvious reason that this additional element may have been the turning point in the previous decision."

See page 584 of 117 Ill., *supra.*

In the *Wahle* case, *supra,* final decree on the merits after trial by jury was entered against the husband, dismissing his bill for divorce, charging his wife with "willful desertion." Upon the subsequent hearing of her bill for separate maintenance she urged (page 512 of 71 Ill.) that the verdict and decree against her husband on his bill for divorce was a judicial determination justifying her in living apart from her husband, as her answer admitted she had done for two years.

This contention was overruled on the plain ground

that *the issues* in the two cases *were different;* that so far as the question of the wife's living apart without her fault, which was the issue in the *second* suit, was drawn into the *first* suit for divorce for willful desertion, it came in *incidentally* and *collaterally* only. Hence the verdict against the husband and the decree thereon dismissing his bill *were not a judicial determination* that she was justified in living apart from him or entitled to the relief prayed by her bill for separate maintenance. The familiar principle of law governing the case was announced as follows:

> "A judgment or decree is not evidence upon a question which was only collaterally drawn in question, nor to any matter incidentally cognizable, or where it is to be inferred from the judgment only by argument or construction."
>
> Freeman on Judgments, Sec. 258.

REPLY, SERIATIM, TO POINTS IN BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

As the brief and argument of the learned counsel for the plaintiff in error has come to hand so short a time before the present brief is due as to preclude a more satisfactory method of replying to it, the writer will take up its statements and positions as nearly as may be *seriatim*, trusting that the deficiencies of this method may be to some extent supplied by the foregoing presentation of the case prepared with a view to anticipating the positions which opposing counsel were supposed likely to take.

With reference to what counsel say in their statements (p. 2) as to the holding of the California Supreme Court that the Illinois decree was a "consent decree," counsel certainly do not mean to impute to that court the holding that the decree *in its entirety* was a consent decree. They must mean only, as that court clearly meant, that the supposed finding and judgment in said decree that the wife was living apart from her husband without her fault, was so entered by consent pursuant to the stipulation hereinafter mentioned; not that the rest of the decree relating to the amount of alimony, custody and support of children, *et cetera*, was entered by consent. For neither the court nor the parties nor counsel on either side have ever held or claimed that the decree was by consent as to said *contested* matters.

Whenever and wherever, therefore, in the opinion of the Supreme Court of California, the expressions "entered into by consent," "judgment by consent" or "con-

sent judgment" are used, it is manifest that they all mean the same thing and are limited to the ostensible, but only ostensible, finding and judgment clauses referring to such living apart, and do not extend to any other judgment clauses which relate to the contested matters.

Whenever in this brief, likewise, the expression "consent decree" or "decree by consent" occurs, they must be understood in the same limited sense in which they were used in the opinion of the California Supreme Court.

Counsel, therefore, must agree with us that the following sentence of that court's opinion (Trans., 110) is restricted as above indicated, namely: "It thus appears from this case that the courts of Illinois will not allow the application of the doctrine of estoppel to a consent judgment which merely registers an agreement between the parties;" and the same may be said of the following sentence (p. 110): "That judgment having been entered into by consent would not, in the courts of Illinois, raise the bar of estoppel against the determination of the issue of desertion."

This last paragraph in the closing sentence of the opinion, narrowed down in its application to the judgment clause relating to "living apart," which was unquestionably put into the decree through the sole agency of the stipulation between the parties, and to which the court also became an acting and active party, presents the precise question under discussion, namely, whether such a judgment clause so entered into by consent would not, in Illinois, and therefore in California, *raise the bar* of estoppel against the determination of the issue of desertion.

If that part of the ostensible judgment clauses of the

decree relating to such living apart "proceeded," as in her answer (Trans., 10), pleading them as bar, she alleged they did proceed, upon the stipulation therein referred to, we are at a loss to know how counsel are going to fulfill their prediction that they will show that the California Supreme Court erroneously held the said stipulated finding and judgment clauses of the decree to be a consent decree, or, in equivalent terms, a decree by consent.

As to the statement (p. 2) with reference to California never having been the matrimonial domicile of the parties, we need only say at this time that it was conclusively held and decreed by both the California courts on the clear weight of the evidence that California was, and since May, 1895, down to the date of the decree of divorce, in 1901, had been the residence and domicile of the defendant in error; and that her matrimonial domicile ought to have been the same as his and would have been but for her willful desertion.

It is submitted that a wife in the wrong and convicted of it, cannot take advantage of her own wrong in refusing to make the husband's home the matrimonial domicile of both, and especially when, as the record shows (Trans., 41, 68), she persistently rejected at all times after leaving his home down to the date of the decree of divorce, his constant, repeated and standing invitations to return to him and make his home her own. The particulars as to these invitations and rejections are given elsewhere in this brief; and those rejections were facts legitimately tending to prove her desertion.

The next statement of counsel (p. 2) that prior to the commencement of the divorce suit the issue involved in the case had been tried in Illinois and adjudicated in fa-

vor of plaintiff in error, is a begging of all the vital questions now under discussion.

We deny that the issue in the divorce case, namely, willful desertion, which was the only issue, was tried in Illinois, or was an issue in the Illinois case, or was or could be adjudicated in either party's favor in said case. Not only so, but even the issue of her "living separate and apart without her fault" was put out of the case, and the trial of that was explicitly dispensed with by the stipulation of January 3, 1893.

The only prayers of the bill filed by her in Illinois were that it might be found that she was so living separate and apart from her husband without her fault and that the defendant be decreed to provide her with separate maintenance.

Had the issue of her so living apart remained in the case, instead of being put out of it by a stipulation, and had there been *a trial* of that issue, instead of a trial being dispensed with, and had there been a decree upon such issue and trial against her, the only question such decree would have conclusively settled would have been *"that her living apart from her husband was not without her fault."*

Umlauf v. *Umlauf*, 117 Ill., 585.

If, as decided in said Umlauf case, such a decree against the wife, entered after issue and trial, would not have estopped her from defending on the merits the different issue of wilful desertion in her husband's subsequent divorce suit, it must follow, as estoppels must always be mutual, that a decree in her favor in her separate maintenance suit in any case, and especially if it was entered by stipulation and consent, should not and

cannot bar and estop the husband from bringing, prosecuting and trying upon evidence and upon the merits the complaint for divorce for her wilful desertion, an entirely different issue looking to entirely different relief, not prayed for or competent for the court to grant upon the issues as they stood *in* before they were stipulated *out of* the separate maintenance suit.

As to the additional charges shown (p. 3) to have been made by Mrs. Harding against her husband, by amendments to her bill, it is to be said that they were purely auxiliary and incidental to her only real charge that she was living apart without her fault; and that the defendant's denial of the same and his counter charge that she was living separate without his fault was likewise simply auxiliary and incidental to his defense; and his further allegation that "defendant upon learning of 'such' abandonment and desertion by complainant, immediately sent repeated and urgent invitations to her to return to his house," did not amount to a charge of *wilful* abandonment and desertion, much less a wilful abandonment for two years for which a divorce could be obtained. but only "such" as was just previously characterized and designated, namely her going and remaining away without excuse therefor, wholly of her own fault and without his fault; in other words he simply called by the name of abandonment and desertion what she called a separation without her fault. Such defensive retorts cannot possibly be exalted to the dignity and status of issues to be tried, and cannot plausibly be so tortured as to reasonably lend them that dignity.

Just here we may say that under well settled legal principles and precedents, Mr. Harding, while entitled if he chose to make the wife's wilful desertion after it had continued two years a distinct issue in the maintenance

case by filing an answer and prosecuting a cross-bill distinctly and directly making it such an issue and praying for a divorce on that ground, *he was not obliged to do so;* but might confine his defense wholly to the charge made by his wife, without thereby losing or surrendering his reserved right whenever it suited his convenience to ask for a divorce on the ground of wilful desertion or any other good statutory ground which he may have had, and had the perfect right to reserve and to resort to any of said sufficient grounds and later on procure his divorce therefor on proper and sufficient proofs.

Cromwell v. *Sac County,* 94 U. S., 351-371.
Watts v. *Watts,* 160 Mass., 464.

These principles are enunciated in many decisions, and notably as follows in the two last-mentioned cases:

"Various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defense in one action, which may not exist in another action upon a different demand, such as the smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time. A party acting upon considerations like these ought not to be precluded from contesting, in a subsequent action other demands arising out of the same transaction."

Cromwell v. *Sac County,* 94 U. S. 351-371.

"It would be a harsh and oppressive rule which would make it necessary for one sued on a trifling claim to resist it and engage in costly litigation in order to prevent the operation of a judgment which would be held conclusively to have established against him every material

fact alleged and not denied in a declaration so as to preclude him from showing the truth if *another controversy* should arise between the same parties. There might be various reasons why he would prefer to submit to a claim rather than to defend against it."

Watts v. *Watts*, 160 Mass., 464.

We therefore differ radically from counsel's claim that the issue of willful desertion was clearly and sharply presented by the husband's answer to the separate maintenance bill.

We have already commented elsewhere on the finding of the decree "that the equities were with the complainant." (Page 4, counsel's brief.) If the decretal clause that she was living separate and apart from her husband without her fault was put into the decree by stipulation as consent of the parties, as we deem to be unanswerably proved, then, of course, the "equities were with the complainant" to have just what the stipulation provided she should have, namely, separate maintenance; such were her equities as per stipulation and as per stipulated decree.

Nothing, we think, can be made out of the point (page 4) that when the decree was entered Harding objected and excepted to it and to every finding thereof, nor of the further fact that he prosecuted appeals therefrom. His stipulation was not that the wife might take a decree for any amount the master or the court might see fit to fix, but only for such a sum as might be just and equitable.

The master fixed $8,000 per annum; the Circuit Court cut it down to $6,400 per annum; and the Supreme Court cut it down to $3,600. The stipulation manifestly contemplated that there should be no decree at all except

after finding on evidence of an amount that would be reasonable and which was just necessarily a condition to the entering of the decree by consent; otherwise no decree was to be entered at all, and whenever the reasonable and just amount should be adjudged, the decree finding that she was living apart without her own fault was to be entered as a decree by consent, but not before; if so entered when the amount found was unreasonable and unjust, Mr. Harding had, of course, a right to except and appeal from it, the ground of his exceptions and appeal being, of course, that the conditions had not been fulfilled upon which such decree by consent was to be entered.

In no event was it intended by the stipulation that evidence should be heard or adjudication had on the issue that she was living separate and apart without her fault; since that issue was, by the stipulation, put out of the case, not to be *tried*, no evidence to be heard upon it, and all evidence upon such an issue being shut out by the court's adjudication contained in its order of reference. (Trans., p. 79.)

The reference of counsel to the reports of the case of *Harding* v. *Harding* in the Supreme and Appellate courts of Illinois are references to matters outside of the record and transcript, and should not, we submit, have any weight with this court for that and other reasons.

The argument on page 5 of counsel's brief is remarkable for the coolness and calmness with which it ignores the law as elsewhere quoted from *Wahle* v. *Wahle*, 71 Ill., 514, that "a judgment or decree is not evidence upon a question which was only collaterally drawn in question, nor to any matter incidentally cognizable nor where it is to be inferred from the judgment only by argument or

construction." Counsel's said argument further ignores the leading and luminous decision of this court on the same and cognate questions in *Cromwell* v. *Sac County*, wherein the court, Mr. Justice FIELD delivering the opinion, said:

> "There is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. * * * But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined. Only upon such matters is the judgment conclusive in another action."
>
> *Cromwell* v. *County of Sac*, 94 U. S., 197.

The case of *Burlen* v. *Shannon*, 3 Gray (69 Mass.), 387, wherein the opinion was written by Chief Justice SHAW, is a most interesting case in every point of view upon various questions under discussion. The syllabus is:

> "A decree of this court, dismissing for want of proof a libel, filed by a wife against her husband,

after having left his home, for a divorce from bed and board for extreme cruelty, is not conclusive evidence of her having unjustifiably left his house, in an action by a third person against him for necessaries furnished the wife."

The issues in the two cases were held to be "distinct," notwithstanding "the proof of each may depend, to some extent, more or less, on the same evidence, *but not necessarily so.* The same acts of violence which would prove extreme cruelty in the one case, would prove such misconduct on the part of the husband and danger on the part of the wife, as would render it justifiable for her to quit his home and seek refuge elsewhere."

> "The two are distinct judicial proceedings, and commenced and conducted with a view to different ends, by different means, and the judgment in one does not necessarily afford ground for a decision in the other. A judgment or judicial determination is conclusive, even between the parties, as evidence *only* of what is *directly put in issue and tried,* not of the collateral and incidental facts which are involved in the discussion, but not embraced in the decree. (1 Greenl. Ev., Sec. 528.)"

The fifth point decided (p. 391) is very interesting and applicable in the present case. It is this:

> "It follows, as a necessary conclusion, that, as the former judgment was on another issue, *there is no objection to using the same evidence,* if pertinent to the issue, in another case between the same parties. * * * *It is only when the fact is specially put in issue, traversed and tried,* that a verdict and the judgment following it, are evidence against a party." (Citing cases.) "It is argued that the acts of cruelty charged in the libel ought not to be again offered in this suit, because, these facts being alleged in the former suit, the effect of the judgment was to disprove them. But this cannot be maintained, for the reason above mentioned that the judgment did

> not directly decide upon the truth of the facts particularly relied on in this case."

It should be equally evident in the present case, that the decree in the maintenance suit, even if it had been an adjudication and not a decree by consent, did not *directly* decide anything but the fact in issue, namely, that the wife was living apart without her fault; and as that is not the issue or an issue in this case, whatever probative value that fact might or might not have if admitted, in connection with other facts, upon the different issue in this case of wilful desertion by the wife, would arise as a mere matter of argument, deduction and inference, and so would not be an estoppel nor conclusive or even evidence upon the totally different issue in this case.

Again, Chief Justice SHAW said in another case, *Sawyer* v. *Woodbury*, 7 Gray (73 Mass.), 502:

> "Estoppel is laden with conditions and qualifications which must be strictly observed, without which it would sometimes operate harshly to exclude the truth. It must be an averment of a fact precisely stated on one side and traversed on the other, and found by the jury affirmatively or negatively, in direct terms, and not by way of inference."

Suppose the maintenance decree in this case had contained an explicit finding and judgment order adjudging that either spouse had wilfully, without cause, and without the other's consent deserted the other and continued such wilful desertion for the satutory period, would not that finding and judgment order have been as the pleadings stood, entirely outside of the issue; and if a divorce for wilful desertion had been decreed without any prayer for it on either side, would not that too have been foreign to the issue and totally ineffectual as a bar or for any other purpose?

Smith v. *McCool*, 16 Wall., 563, is a very strong case against estoppel by consent. The agreed case related to the pedigree of the plaintiff's grantor and was put in the form of a special verdict, upon which judgment was finally rendered for the defendant as ordered by the Supreme Court. Nevertheless all this was held by the court no estoppel, not even evidence; the court saying, amongst other things:

> "The rule of the court which required plaintiff to prove the heirship *aliunde* subjected him to no hardship. If the facts were as found by the special verdict, there could be no difficulty in proving them, as they were proved before. If the facts were otherwise, to admit the estoppel would have involved the sacrifice of justice to a technicality and have subjected defendant to a grievous loss, which he ought not to be required to bear. The parties were properly allowed to stand in the second action in all respects upon a footing of equality as they stood in the first."

In view of the indisputable fact that the master, by the order of reference, was prohibited from taking and considering any evidence whatever upon the eliminated issue of the wife's living apart, we do not comprehend the object of the references to testimony before the master found on pages 9 and 10 of counsel's brief.

On page 11 counsel again lapse into the same error and statement concerning the "identical issue."

On page 12 they imply that the use of most of the same evidence in the two cases identifies the issues as the same.

This was not, as we have seen, Chief Justice Shaw's opinion.

What is said on page 12 about the claim of Mrs. Harding's answer as to "admission of record," and "sol-

emnly admitted of record," should be read in connection with the *nunc pro tunc* order of reference (Trans., 15), whereby the words "now admitting in open court" were stricken out and words relating to the stipulation substituted in their place.

On page 13 counsel make the important and significant admission that "the divorce came on to be heard upon the complaint and upon her answer and supplemental answer, and *upon evidence introduced*"—in other words, they admit that the hearing was upon the merits and upon evidence relating thereto.

And upon the same page they undertake to press into service as proof of identical issues the stipulation as to evidence filed in the California court and that evidence itself; claiming, on page 14, that under said stipulation the testimony of thirty-seven witnesses who testified in the Illinois case was read *on the hearing;* and on the same page they distinctly say that the two cases were *"tried largely on the same evidence."*

We claim, on the other hand, that while said stipulation and evidence and trial by no means prove that the issues were the same, they do by all means prove that the estoppel defense pleaded was utterly waived, and the trial became and remained to the end a trial upon the merits, wherein after failing of success, upon which she speculated, the wife sought in the Supreme Court of California to return to her said plea of estoppel, after waiver of the same, when that court also defeated her upon the merits and upon the weight of the evidence.

As held by the Supreme Court of California in this case, quoting *Megerle* v. *Ashe*, 33 Cal., 74, 84:

> "A party cannot rely upon a judicial determination of the issue by way of estoppel and also upon

proof of the facts upon which the determination is based. The necessary effect of the estoppel is to preclude all inquiry as to the truth of the matter determined, and when a party who is entitled to set up the estoppel does open the inquiry into the truth of the matter, he cannot complain if the other party pursues it without regard to the estoppel."

In another case the Supreme Court of New York held as follows:

"We do not think that the point that the matters involved in this suit are *res judicata* is well taken * * * The whole trial proceeded notwithstanding the allegations in the complaint that there had been a previous adjudication * * * upon the theory that the question was still open * * * and the case having been submitted * * * upon all the evidence, we think that the plaintiff is estopped from taking the position that the defence could not litigate that question in this action." *Howe* v. *Lockwood*, 17 N. Y. Supp., 817-9. See also *Pearce* v. *Frantum*, 16 La., 414; Black on Judgments, last Ed., on waiver of estoppel and ref's.

Here the plaintiff in error went voluntarily not only into the stipulation but into the introduction of evidence thereunder and trial of all the issues under said evidence.

Issues not identical under special features of California code. Illustrative cases.

Further, we maintain that there was no identity of the question raised under the Illinois statute in the Illinois court—even if that question had been litigated and judicially determined—with the question raised by the pleadings in divorce case. The rule is that:

> "In order that a judgment in one action may constitute an estoppel upon the parties thereto in a subsequent action it must be made to appear either upon the face of the record or by extrinsic evidence, that the identical questions involved in the issues to be tried were determined in the former action * * * 'Every estoppel must be certain to every intent, and not to be taken by argument or inference.' (Coke on Littleton, 352b.) 'If, upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered in evidence.' (*Russell* v. *Place*, 94 U. S., 606.)"
>
> *Beronio* v. *Ventura Co. Lumber Co.*, 129 Cal., 236.

The issue for decision in the present case arises under the statute of California defining the offense of desertion in matrimonial law. By Sec. 92 of the Civil Code one of the grounds for which a divorce may be granted is "willful desertion." Willful desertion is defined in Sec. 95 to be "the voluntary separation of one of the married parties from the other with intent to desert." Sec. 100 provides that "Absence or separation proper in itself becomes desertion whenever the intent to desert is fixed during such absence or separation." Sec. 102 declares that if one party deserts the other and before the

expiration of the statutory period required to make the desertion a cause of divorce, returns, etc., and solicits condonation, the desertion is cured. If the other party refuses, such refusal is desertion. The perusal of these sections of our statute will suggest sundry questions which may arise in an action of the character before the court here, and which could not arise under the statute of Illinois. The statute of Illinois defines a state of circumstances under which the wife may obtain separate maintenance. The statute of California defines other and different circumstances under which the husband (for example) may obtain relief from the bonds of matrimony. Thus, to illustrate: Suppose Mrs. Harding were living in the State of Illinois separate and apart from her husband without her fault; she would be entitled to a decree against her husband for maintenance under the statute of that state. But it is provided by the California Civil Code that such separation, proper in itself, becomes desertion whenever the intent to desert is fixed during such separation. (C. C., 100.) If, therefore, Mrs. Harding, although living separate from her husband without her fault, formed the fixed intent to desert during such separation, then in virtue of C. C., Sec. 100, her separation became desertion. And desertion arising in that way, if continued for one year, gave to her husband, by the law of this state, a ground for divorce. (C. C., Sec. 107.) It is therefore apparent that under the law of Illinois a woman might be living separate and apart from her husband without her fault, enjoying a maintenance decreed to her by the Illinois court, and yet by the law of this state, if she formed a fixed intent to desert, afford to her husband domiciled in this state a cause of action for divorce on the ground of desertion.

So, take the events of this case: The wife separated herself from her husband on or about February 1, 1890. The Illinois court—by virtue of a stipulation of the parties—held that such separation was without her fault. But a few days later she entered his house with her children by his invitation and he urged her to return (Trans., 39-41), and again, to wit, on February 5, 1890, Mr. Harding addressed to his wife a letter in affectionate terms, asking her to return, saying "if there are any obstacles to your return home at once I am willing to do what I can to remove the same," etc. (Trans., 41.) And in his answer in the suit for maintenance the husband again urged his desire and request that his wife return to his home "and take and retain her place there as his wife," promising to do all in his power "to fill the remaining days of her life with happiness and peace." (Trans., p. 43; March 19, 1890.) Now, by the law of California, upon these offers made by the husband, even if he had previously been in fault, it was the duty of his wife—assuming that his offer was made in good faith, which the findings and judgment of the court below impliedly assume—to return; and her refusal to do so was desertion. His offer and her refusal are facts tending to prove her desertion. (*Howard* v. *Howard*, 134 Cal., 346; *McMullin* v. *McMullin*, 123 Cal., 653; Civil Code, Sec. 102.) So that, although in Illinois Mrs. Harding might have separated herself from her husband and lived separate from him without her fault, yet after his offer of reconciliation and her refusal of the same, she was, under the statute of, and the decisions in California, guilty of desertion.

The impossibility of finding identity in the question to

be tried under the Illinois statute relied upon by Mrs. Harding and the question for trial under the charge of desertion made by the plaintiff in his complaint under the law of California, results from the intrinsic differences in the legislation involved in the two suits respectively. We submit it to be clear that an action for divorce under the provisions of the California Civil Code relative to the matrimonial offense of desertion cannot be cast into the same mold with an action for separate maintenance under the Illinois statute set out at folios 16-17 of the transcript, and therefore there is no identity of questions involved, within the meaning of the rules epitomized in *Beronio* v. *Lumber Co.*, 129 Cal., 236.

That to constitute estoppel by matter of record there must be entire identity of the issue decided and the issue to which the estoppel is sought to be applied, and for additional illustration of the rule, see *Freeman* v. *Barnum*, 131 Cal., 386; *McDonald* v. *B. R., etc., M. Co.*, 15 Cal., 145; *Williams* v. *Williams*, 63 Wisc., 58; *Aspen* v. *Parker*, 2 Burr., 666.

FURTHER THE ESTOPPEL FAILS BECAUSE THE FINDING IN THE PRESENT CASE DOES NOT RELATE TO THE SAME TIME AS THE FINDING IN THE FORMER CASE, AND HENCE THE ESTOPPEL LACKS THE IDENTITY REQUIRED.

The finding in the Illinois case considered as an estoppel must be within the issue in that case. The issue in the Illinois bill and again as alleged in the answer in the case at bar is only this, viz.: that the wife left her husband on February 1, 1890, and was when the Illinois bill was filed on February 3, 1890, living separate from her husband without fault.

(In *King* v. *Chase*, 15 N. H., 16), cited favorably more

than once in this court, the sound doctrine is thus laid down: "A fact or matter in issue is that upon which the plaintiff proceeds by his action and the defendant controverts by his pleadings," and out of said pleading upon such issue only can an estoppel in a former case upon a different legal matter stand.

That she was living separate and apart without fault after February 3, 1890, was not in issue, nor can it, as the authorities presently cited will clearly show, be collected or inferred from the sentence; from the grant, for example, of alimony for a subsequent period or any other finding in the decree that such separation without fault existed or continued at a later date than the separation alleged in the bill, and the only separation in issue.

The wife could not have been defeated in the former case by proof of her desertion at any time after bill filed.

The complaint in the case at bar alleges desertion "on or about February, 1890" (*Id.*, 2); the finding of the court finds desertion "on or about the first day of February, 1890." (*Id.*, 46.) Desertion on February 3, 1890, after this bill in Illinois was filed, or at any day later in February, would be sufficiently described by the time fixed for the desertion in complaint and finding.

THE DATE OF THE DESERTION MAY HAVE BEEN ANY TIME ON OR ABOUT FEBRUARY, '90, AND ON OR AFTER FEBRUARY 3, '90, WHEN THE ILLINOIS BILL WAS FILED.

The chancellor had good ground for his finding and decree; for in the present case the evidence shows that on or about February, 1890, just *after the former bill was filed, the wife came again by her husband's invitation into his house* (Test. Resp., *Id.*, 93) and being urged by him to stay replied: "I have made mistakes enough" and again left his house. On February 5th, he again

wrote to her a letter in evidence (*Id.*, 95, Test. Resp.) urging her to return to her home to which she made no reply. In his answer of (*Id.*, 160) March 19, '90, in Illinois case, the husband writes and requests her return home and alleges that he has sent repeated and urgent invitations to her to return. Upon either of these three pieces of evidence the chancellor may well have decreed that on or about February 1, 1890, she deserted her husband and that her subsequent living separate and apart without fault up to filing her bill on February 3, 1890, in the former case may well stand with the finding in the present case that she deserted her husband and lived separate and apart from him without just cause after the Illinois bill was filed.

No subsequent desertion was set up in the answer in the former case; the language of the answer relating to her conduct relates, and must be properly construed to relate, to the time of filing the former bill; but this is not important because the chancellor in the Illinois case certainly did not hear evidence and did not upon consideration of such evidence determine whether she had deserted her husband after bill filed.

It is certainly sound law that "every estoppel because it concludeth a man to allege the truth must be certain to every intent and not to be taken by argument or inference;" and where the door is opened by the party pleading the estoppel and the truth introduced, a court of justice will be especially slow to turn it out.

(Coke upon Littleton, L. 3, C. 12, Sec. 567.)

"Certainty is essential to all estoppels." (Bigelow on Estoppel, 5th Ed., 578.)

The question turns upon whether the decree and find*ing* in the case at bar was "Necessarily at variance with

the judgment ON THE PLEADINGS" in the former case; "and otherwise there is no estoppel."

(Bigelow on Estoppel, p. 77.
Brown v. *Mayer*, 66 N. Y., 385.
Blair v. *Bartlett*, 75 N. Y., 150.
Nemetty v. *Moylin*, 100 N. Y., 562.
Orr v. *Mercer County Ind. Co.*, 114 Pa., 367.)

"It is true that such matter" (flow of water) "was necessarily involved and must have been determined before judgment could have been entered in former suit; but it does not appear from the record that such question was raised and litigated."

Freeman v. *Barnum*, 131 Cal., 386.

Findings *outside the issues* have no effect as to estoppel.

Lillis v. *Erie Ditch Co.*, 95 Cal., 858.
Russell v. *Place*, 94 U. S., 606.

"It must be a fact *in issue* as distinct from a fact in controversy, * * * found *according to the pleadings.*" (*Id.*, 559.) "Only upon issues *upon which judgment depends* are parties estopped."

1 Greenleaf's Evidence, Sec. 528.
McDonald v. *Black Co.*, 15 Cal., 145.

The estoppel here would rest upon mere inference that said matter was determined from the allowance of alimony after February 3, 1890, and hence was tried and heard and properly decided; but "before that can be done, the law not favoring estoppel, the truth is not shut out except that it shall appear with certainty that such matter has been so determined, and also that it was within the issue shown by the pleadings."

People v. *Frank*, 28 Cal., 507.

The question must have been *submitted on its merits.*

Greenleaf on Evidence, Sec. 530.

Gray v. *Dougherty*, 25 Cal., 272.

In *Aspen* v. *Parker*, 2 Burr., 666, Lord MANSFIELD delivered the opinion as to effect of a former judgment in ejectment in later action for mesne profits, and he laid down the principle:

> "That this judgment, like all others, only concludes the parties as to the subject-matter of it. *Therefore, beyond the time laid in the demise, it proves nothing at all; because beyond that time plaintiff has alleged no title,* nor *was he bound to prove any.*"

In *Bozquit* v. *Crane*, 51 Cal., 505, action for damages for trespass to land, the plaintiff relied upon certificate of purchase from the state and the defendant put in issue plaintiff's title. Although plaintiff recovered judgment, it is not a bar to a later action by defendant against plaintiff to determine which had better right to buy from the state.

In *Sawyer* v. *Boyle*, 21 Texas, 28, a decree of distribution of an estate, it was held, necessarily involves the fact that all distributees are living, but this only incidentally as the basis of the decree; but the decree is not conclusive, for one or more distributees may be shown to be dead at the date of the decree, and it makes no difference that the former decree recites their presence. (*Id.*, 27 Texas, 448; 2 Freeman, Sec. 612.)

So, where the first suit by wife is for necessaries and the second is for her board; the first suit did not show whether the husband and wife were cohabiting at the time; it was held that since the *fact was not directly in issue in that suit and could only be inferred by argument*

from the judgment, the record could not be used in second suit to show the husband had driven away wife.

Lentz v. *Williams*, 17 Pa., 412.

In *Lewis* v. *Nelson Appeal*, 67 Pa., 153, it was held that the estoppel of a judgment extends *only to the question directly involved in the issue*, and not to any incidental or collateral matter, though it may have been passed on.

That was the case of an application to sell land, and the amount due from the personal representative to the estate became matter in controversy affecting the amount of the assets primarily chargeable, yet this *was not matter in issue, though in controversy;* and the decree was held not to be conclusive on the final settlement of the executor's account.

In *Ford* v. *Ford's Adm.*, 68 Ala., 41, where suit was had upon an agreement to buy realty and jury found for defendant, it was held that the delivery of the deed *was not in issue within the meaning of the rule, though passed upon*, so as to require the court in an action of covenant to take from the jury the question of delivery of the deed.

Car v. *Buehler*, 120 Pa., 341.

In *Williams* v. *Williams*, 63 Wisc., 58, where the former action was for divorce, alleging the wife *duly and legally married at a time and place named* and *setting up desertion as a ground for divorce;* and the defendant did not answer, so that a *decree was taken by the wife.* Meantime, she contracted marriage with a second husband and after his death brought suit for dower in his lands, and it was resisted on the ground that she was not his wife and her divorce decree from the first

husband was put in evidence. The court held that *she was not estopped to show by other evidence that she never was legally married to the alleged first husband,* because he had a wife living, and so had no capacity to contract marriage; and this on the ground that the decree of divorce *did not actually pass upon the validity of the marriage; because this validity so far as it entered into the decree* in the former case was a matter ONLY INCIDENTALLY COGNIZABLE OR INFERRED BY ARGUMENT FROM THE JUDGMENT."

(In *People* v. *Johnson*, 38 N. Y., 63.) It was held that *although a decree in express terms professes to affirm a particular fact,* yet as such fact was *immaterial to the issue and the controversy did not turn upon it,* the decree will not conclude parties in reference to such fact.

In Smith's Leading Cases, Vol. 2, p. 2013, 10th Ed., it is laid down with authorities cited in support of it: "If a thing is *not directly and precisely alleged it shall be no estoppel,* for an estoppel *not being* favored by law must be certain to every intent."

"If the *language of a decree is general it may be restrained to the issues made in the case* and to the subject matter under consideration by the court."

McDonald v. *Black Co.*, 15 Cal., 145.

In view of the opening by the stipulation and evidence thereunder of the whole inquiry into the truth of the matter alleged, namely, willful desertion, and the decision of that issue and all others adversely to plaintiff in error, we urge with confidence that the decision of this case did not and does not necessarily turn upon any federal questions; that this court, therefore, has no jurisdiction of this cause, and that the writ of error should be dismissed

for such want of jurisdiction, which dismissal we respectfully ask.

We cheerfully concur in the admission of opposing counsel (p. 22), sustained by so many of their citations, that it must appear that the decision of the federal question upon which the case is brought to this court must have been necessarily involved in the state court and that the case could not have been determined without deciding such question.

Authorities to that effect might be indefinitely multiplied, but for our purposes we need add only one more case, *Murdock* v. *Memphis*, 20 Wall., 590, where Mr. Justice MILLER, delivering the opinion of this court, laid down certain cardinal essentials to the jurisdiction of this court over the judgment of a state court, among which were:

> "1. That it should appear by the record that one of the questions mentioned in the Federal Judiciary Act *must have been raised and presented in the state court.*
>
> "2. That it must have been *decided,* or *that its decision was necessary,* to the judgment or decree rendered in the case.
>
> "3. That the decision must have been against the right claimed or asserted by plaintiff in error under the constitution, treaties, laws or authority of the United States.
>
> "4. If found rightly decided, the judgment must be affirmed.
>
> "5. If erroneously decided, *but any other issue is adjudged by the state court sufficient to maintain the judgment, it must be affirmed without inquiring into the soundness of the decision of such other issue.*"

As to all questions of fact, including questions of desertion, domicile, good faith, etc., we submit that not only are those questions properly held by the California Supreme Court to have been conclusively settled by the

decree of the trial court in San Diego County (Transc., 108) but they are by this court held conclusively settled by the decision of the state courts.

McKinney's 4 Fed. Stat. Ann. (1904), p. 490.

As to the question suggested by counsel (Trans., 38) "whether jurisdiction to render a divorce having extra territorial effect could be acquired by a mere domicile in the state of the party plaintiff where there had been no matrimonial domicile in such state," we leave counsel for the present to wrestle with it alone until such time as they can produce a controlling authority upon the question. They substantially admit that they have found none and that in two cases which came to this court, the question was "expressly reserved."

We do not see, however, that the question of the extra territorial affect of this divorce decree, outside of California, now properly arises. The divorce decree was entered in California; and it would seem that upon this record, no question is involved save its effect as a valid decree of divorce in the State of California and not its effect in any foreign state. It will be time enough to decide that question when it properly arises and demands decision.

As to the assertion of counsel (p. 26) that "the California court was bound by the Illinois decree *yet proceeded to adjudicate the identical issue upon, in great part, the same identical evidence,*" etc.,—it should be borne in mind that the court did not force the plaintiff in error to put in or agree that either party might put in the whole or any part of the so-called identical evidence; but that the plaintiff in error and her counsel, by entering into the stipulations at the California trial and putting in old and new evidence upon the issues there pending

and tried, *absolutely waived* their pleas of bar and estoppel.

On page 29, counsel virtually claim that the decree and its recitals as to hearing upon bill, answer, replication and proofs, preclude all right to prove that the decree together with those very recitals was in truth and reality a decree by consent.

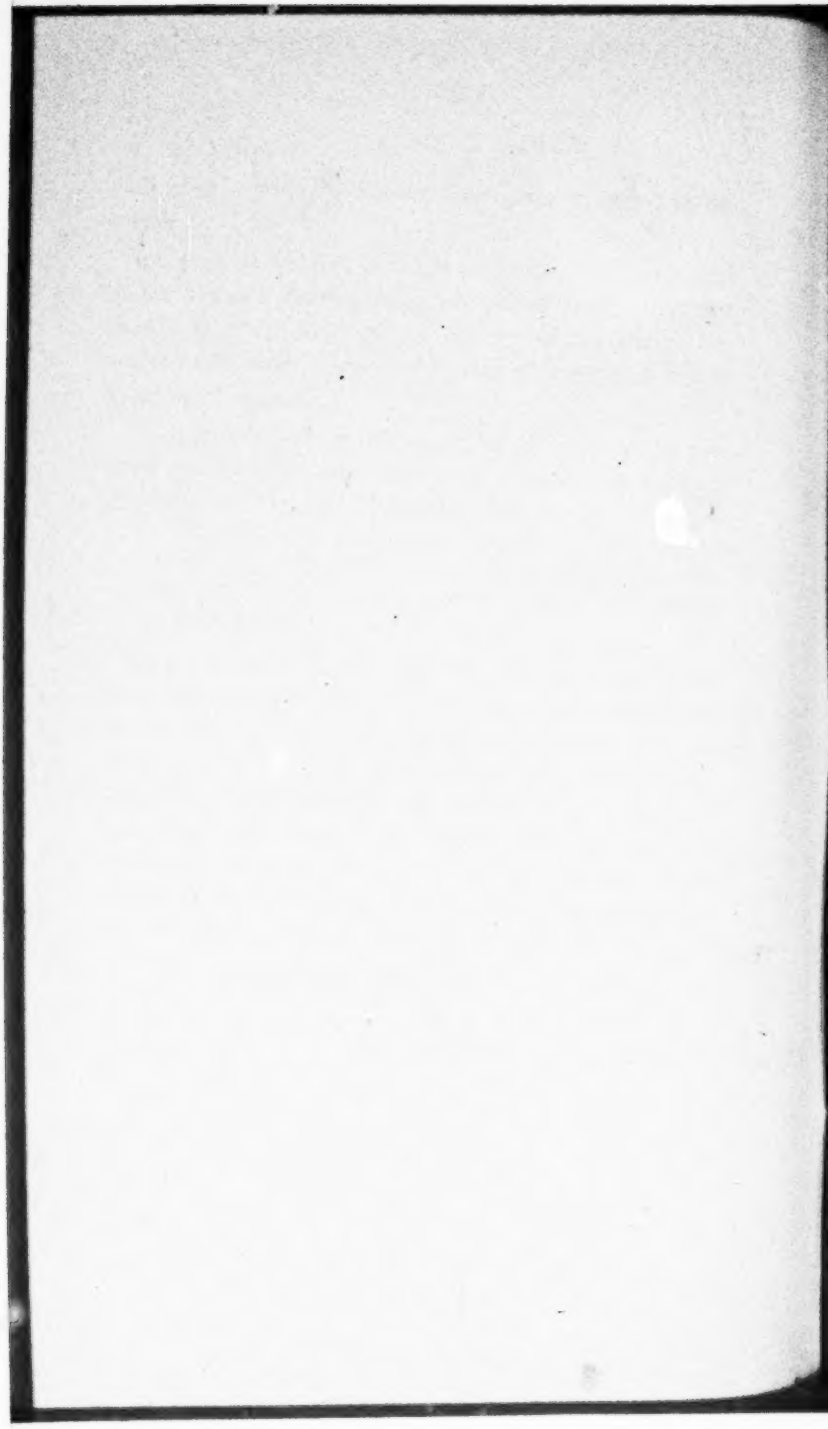
A quite sufficient answer to all this is that given by this court in *Gay* v. *Parpart*, 106 U. S., 679-699 (approving *Wadhams* v. *Gay*., 73 Ill., 415), *viz:*

> "Equity will penetrate beyond the covering of form and look at the substance of the transaction, and treat it as it really and in essence is, however it may seem."

With reference to the supposed misconception by the California Supreme Court of the Illinois Supreme Court's decisions in the last mentioned case and another case, we fail to see the force of the criticism. To our apprehension, while it is true that other points of law dwelt on by counsel were involved and decided, still the cases did lay down and decide the law of *res judicata*, and as to consent decrees and estoppel correctly and in conformity with the best authorities on those subjects.

Respectfully submitted.

WM. H. BARNUM,
Attorney for Defendant in Error.



FILE COPY.

Office Supreme Court U.
FILED
APR 22 1905
JAMES H. McKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 222.

ADELAIDE M. HARDING, PLAINTIFF IN ERROR,

v.

GEORGE F. HARDING.

ADDITIONAL AUTHORITIES FOR THE DEFENDANT IN ERROR.

On Waiver of Estoppel.

92 Penn., 499, Seymour *v.* Hubert.
60 Fed. Rep'r, 751, Mack *v.* Levy.
13 How. (U. S.), 335, Phila. R. R. *v.* Howard.
151 N. Y., 264, Brady *v.* Nally.

On Consent Decrees.

Kelly *v.* Milan, 21 Federal Rep'r, 863.

WM. H. BARNUM,
Counsel for Defendant in Error.

Supreme Court of the United States.

No. 222.—October Term, 1904.

Adelaide M. Harding, Plaintiff in Error, vs. George F. Harding. } In error to the Supreme Court of the State of California.

[May 15, 1905.]

Mr. Justice White delivered the opinion of the Court.

The law of Illinois (Laws of Illinois, 1877, p. 115) provided as follows:

"That married women who, without their fault, now live or hereafter may live separate and apart from their husbands, may have their remedy in equity in their own names, respectively, against their said husbands for a reasonable support and maintenance while they so live separate or have so lived separately and apart; and in determining the amount to be allowed the court shall have reference to the condition of the parties in life, and the circumstances of the respective cases; and the court may grant allowance to enable the wife to prosecute her suit, as in cases of divorce."

On February 3, 1890, Adelaide M. Harding filed her bill in the Circuit Court of the county of Cook against her husband, George F. Harding.

It was alleged that the parties were residents of the city of Chicago. In substance, in the bill and an amendment, it was charged that, without her fault and in consequence of the cruel treatment of her husband and of his adultery, the plaintiff had been obliged to live apart from him. It was prayed that the court decree that she was so living apart without her fault, that it would award her the custody of certain of the children of the marriage, and that the defendant be decreed to provide for the separate maintenance of the complainant and the support of the children. The answer and an amendment thereto admitted the marriage, the birth of the children and the residence in Chicago, denied the charges of cruelty and other misconduct, and averred that the complainant was living apart solely through her own fault, and that she had refused to return after repeated requests, which were reiterated in the answer.

We shall hereafter, as far as possible, refer to the parties to that litigation, who are the parties to this suit, as the wife and the husband, respectively.

The court, by an interlocutory order, fixed a sum to be paid by the husband for the fees of the solicitors of the wife, for the maintenance of the

wife during the pendency of the cause, and for the support of the minor children.

The case was put at issue and much testimony was taken. With this testimony extant and nearly three years after the commencement of the suit, on January 3, 1893, a document was filed in the papers of the cause signed by the husband and by his solicitor. In substance the paper recited that at the time of the commencement of the suit the wife had in her hands a considerable amount of property and money belonging to the husband which was applicable to her maintenance, and that when this sum was expended the husband would feel it his duty to furnish further money to support the wife, whatever might be the result of the cause. That the husband was confident of making a successful defence to the suit, but that it seemed to him it was best for the sake of peace and to avoid scandal to put an end to the litigation by consenting to a decree in favor of the wife for a separate maintenance, the paper further stating:

"Hence, I give my consent that a decree for separate maintenance shall be entered in favor of the plaintiff without finding or trial of the issue in this case. That this consent is not collusive is sufficiently shown by the length and character of the litigation. I further offer and stand ready to make such other or further or different stipulation by an amendment of the pleadings or otherwise, as may, in the opinion of your honor, be required to make it unnecessary for the court to hear and decide upon the issues in evidence in this case after a long and expensive hearing. To this end I declare my willingness to stipulate and I do hereby stipulate that the plaintiff, at the time of the commencement of this suit, was living and ever since has been living separate and apart from her husband without her fault, and may take a decree with my consent for such sum as may be reasonable and just for her separate maintenance. This is the same offer which I have made by way of an attempt at compromise ever since the commencement of this suit, in which effort at compromise I have not hesitated to offer double the amount that in my opinion should be allowed for her separate maintenance by the court."

The wife, on January 17, 1893, filed a counter statement. She in substance declared that she had no previous knowledge of the intention of her husband to file the paper which he had submitted to the court; that she had always been confident of the justice of her cause and of maintaining the same, and that the testimony then taken in the cause gave her great certainty of the establishment of her rights; that she had always been willing to adjust the amount to be allowed for her separate maintenance, provided there was a "finding and decree of this court thereon that she was, at the time of the filing of the bill herein, living separate and apart from the defendant without fault on her part and has been so living ever since." The statement then referred to certain negotiations which had been pending between the husband and wife on the subject of the amount of separate maintenance to be allowed, enumerated previous

offers made by the husband on this subject, which she had been unwilling to accept, because the husband had insisted on either the dismissal of her suit, a decree in his favor or an agreement which would not preclude him from suing for a divorce for desertion arising from her having separated from him. It was then stated, in substance, that, as interpreted by the wife, the paper filed by the husband waived the conditions which he had previously insisted upon and assented to a decree finding that the separation was without her fault, and she was willing for the sake of preventing further scandal, to accept the amount previously offered by the husband, although deeming the sum inadequate to her condition of life, "upon the decree finding that complainant was living separate and apart from defendant without fault on her part, being now promptly entered such as the said voluntary stipulation of the defendant justifies." No action appears to have been taken by the court upon these two papers except in so far as may be inferred from the statements which follow.

In May, 1893, the court entered an order referring the cause to a master to take further evidence as to the amount of alimony, &c., to be awarded, "and upon other issues herein than the question as to whether complainant at the time of the commencement of this suit was, and since that time has been and is, living separate and apart from her husband, the defendant, without her fault, said defendant having admitted upon the record herein, and now admitting in open court, that the complainant was living separate and apart from him without fault on her part."

Nearly three years after the matter had been thus referred to the master the order of reference was amended *nunc pro tunc*, as of the date of the previous order, by substituting for the words "and now admitting in open court" the words "as by his written stipulation filed herein on January 3, 1893, and for the purpose of this trial only." A few months thereafter the master filed his report. Therein he stated his conclusions deduced from the evidence taken prior to 1894 on the subject of the right of the wife to her separate maintenance, and found as a matter of fact that her right was established by the proof. He also found that the wife was entitled to a stated sum for her separate maintenance and an additional sum for the support of the children. Exceptions were filed to the report, which were heard by the court, and a final decree was rendered on July 26, 1897. It was recited, among other things, in this decree that the court, "doth find that the said complainant, at the time of the commencement of this suit, was living, and ever since that time has lived, and is now living, separate and apart from her husband, the said defendant, without her fault, and that the equities of this cause are with the complainant." The decree awarded to the wife sums for her separate maintenance and for the support of the children up to the time of their becoming of age, and a further sum for the fees of the solicitors of the wife and other expenses of

the litigation. The decree made no reference to the admission contained in the paper filed by the husband, nor was any statement made which limited the effect of the decree as a final adjudication of the rights of the parties. An exception, on behalf of the husband, was taken to each and every finding of the decree, and sixty days were allowed to prepare a certificate of evidence.

It would seem from the certificate of evidence, which was made several months afterwards, that on the settlement of the decree a controversy arose as to its terms, the wife requesting the court to state in the decree that all the charges made in the complaint and the amended complaint as to cruelty, adultery, &c., had been established by the proof; the husband insisting, to the contrary, that the charges had not been proven, and further asserting that it was not necessary to so find because of his admission of record. The court said that it did not pass upon the question as to whether all the charges made in the complaint were true, because it regarded it as unnecessary "in view of the said paper of the defendant filed herein January 3, 1893."

The husband prosecuted an appeal to the Appellate Court of Illinois for the First District. But before this appeal was perfected, and on August 31, 1897, he commenced in the Superior Court of San Diego, California, this suit against his wife for divorce. The marriage in 1855 and the residence in Chicago were alleged, but it was averred that ever since May 15, 1895, the plaintiff had been a resident of the State of California. The sole ground alleged for granting the divorce was willful desertion by the wife in the month of February, 1890. The answer of the wife denied that the husband was a resident of California, and in a separate paragraph there was specially pleaded the proceedings and the decree of the Illinois court and the admission of the husband on the record therein as to the separation being without the fault of the wife, all of which it was asserted established by the thing adjudged that her living apart was justified and did not constitute desertion.

In the meanwhile, before the trial of the cause, the appeal prosecuted in the Illinois case by the husband was decided against him in the Appellate Court, and he took an appeal to the Supreme Court of Illinois, in which court the judgment was affirmed, with a modification as to the amount of the allowance for alimony, and the trial court changed the amount of its decree accordingly. The wife then by an amended answer again set up the decree in Illinois as amended as *res judicata*.

On the trial the wife introduced in evidence a certified copy of the record of the Illinois suit. The husband introduced, over the wife's objection and exception, a portion of the certificate of evidence, which had been prepared for the purpose of the appeal from the final decree in Illinois as originally entered. The court made findings of fact to the effect that the

parties had been married in Illinois, that the husband was a *bona fide* resident of California, and that on the first day of February, 1890, the wife had deserted her husband without just cause. As a conclusion of law it was deduced that the husband was entitled to a divorce, but that the court was without power in any way to limit or affect the decree for separate maintenance rendered by the Illinois court. After the refusal of a new trial the wife appealed to the Supreme Court of California, and that court affirmed the decree. (140 Cal. 690.)

The question is, Did the Supreme Court of California fail to give due faith and credit to the decree for separate maintenance rendered in favor of the wife in Illinois, which was pleaded by the wife as *res judicata*.

It is suggested in argument that that question cannot be passed upon, as the wife, besides pleading and relying upon the Illinois decree, defended on the merits, and by so doing waived the benefits of the alleged estoppel arising from the Illinois decree. The want of merit in the contention is at once demonstrated by the statement that the Supreme Court of the State of California, in its opinion in the cause, treated the question of estoppel by the Illinois judgment as being open, and actually determined it.

The Supreme Court of California decided that the Illinois decree was not conclusive in California as to the question of desertion, for the following reasons: That decree, the court held, was a consent decree, and being of that character it was not a bar in the State of Illinois. As it was held that the Illinois decree was only entitled in California, under the due faith and credit clause, to the effect which it would have in Illinois, it was hence decided that the Illinois decree did not constitute an estoppel in the courts of California. But we are of opinion that the premise upon which the Supreme Court of California proceeded was a mistaken one and its conclusion based thereon was erroneous, even if the correctness of the premise be conceded for the sake of the argument.

The conclusion of the Supreme Court of California, that the Illinois decree was solely based on the consent of the parties, and was consequently not the result of the action of the court, was based on the following: 1. The paper filed by the husband on January 3, 1893. 2. The recital in the amended order of reference that the admission that the wife was without fault had been made for the purpose of the trial only. 3. The statement of the trial judge, made in the certificate of evidence, that in view of the admission on the record he had not found it necessary to pass upon all the charges made in the complaint.

But the conclusion drawn by the court from these matters assumed that a decree for separate maintenance under the Illinois statute could have been a mere matter of consent, and did not require the ascertainment by the court of the facts made essential by the statute to justify such a decree. That this was a mistaken conception of the Illinois law has been clearly

pointed out by the Supreme Court of that State. In *Johnson* v. *Johnson*, (125 Ill. 510,) an appeal from a decree for separate maintenance, the court said (p. 514):

"To maintain her bill, it was necessary for the complainant to show, not only that she had good cause for living separate and apart from her husband, but also that such living apart was without fault on her part. At common law the husband was liable in an action at law at the suit of any person furnishing to the wife necessaries suitable to her condition in life, if the wife was residing apart from him because of his willful and improper treatment of her, or by his consent. (2 Kent Comm. 146; *Evans* v. *Fisher*, 5 Gilman, 571.) No right of action existed in the wife; courts of equity refusing to take cognizance at her suit, and enforce the legal obligation of the husband to maintain her. (2 Story, Eq. Jur. § 1422.) The statute was passed to remedy this defect in the law, and gave the right to the wife to maintain her bill for separate maintenance, but restricted the right to cases where the living separate and apart from the husband was without her fault. The 'fault' here meant and contemplated is a voluntary consenting to the separation, or such failure of duty or misconduct on her part as 'materially contributes to a disruption of the marital relation.' If she leave the husband voluntarily, or by consent, or if her misconduct has materially induced the course of action on the part of the husband upon which she relies as justifying the separation, it is not without her fault within the meaning of the law. *No encouragement can be given to the living apart of husband and wife; the law and good of society alike forbid it.* But a wife who is not herself in fault is not bound to live and cohabit with her husband if his conduct is such as to directly endanger her life, person, or health; nor where the husband pursued a persistent, unjustifiable, and wrongful course of conduct towards her, which will necessarily and inevitably render her life miserable, and living as his wife unendurable. Incompatibility of disposition, occasional ebullitions of passion, trivial difficulties, or slight moral obliquities, will not justify separation. If the husband voluntarily does that which compels the wife to leave him, or justifies her in so doing, the inference may be justly drawn that he intended to produce that result, on the familiar principle that sane men usually mean to produce those results which naturally and legitimately flow from their actions; and, if he so intended, her leaving him would, in the case, but be desertion on his part, and not by the wife."

In the second place, even if the rule of public policy enunciated by the Supreme Court of Illinois be put out of view, the assumption that the Illinois decree was a consent decree, merely registering an agreement of the parties, disregards the form of that decree, and cannot be indulged in without failing to give effect to the very face of the decree, which adjudged that the separation of the wife from the husband was without her fault. This was an express finding by the court, and one which the law required to be judicially made.

In the third place, if it be conceded that the express terms of the decree could be overcome by considering matters contained in the record, but outside of the decree, the conclusion drawn by the Supreme Court of Cali-

fornia from the consideration of such matters was, we think, a mistaken one. As we have said in stating the facts, after the bringing of the suit for separate maintenance, in which charges of the gravest character were made against the husband as to cruelty, adultery, &c., much testimony had been taken with regard to the charges. And it was in this state of the case that the *ex parte* stipulation of the husband was filed, in which he admitted that the wife was living separate and apart from him without her fault. The declaration in the statement that it was not collusively made eliminates the conception that the admission was made regardless of its truth and independently of the facts shown by the testimony which had theretofore been taken in the cause. When it is observed that shortly following the filing of this paper the statement of the wife was filed accepting her husband's admission as conceding that the proof established that the separation was not caused by her fault, and stating that she had refused the solicitation of the husband to discontinue the cause and accept an allowance to be made by him for her separate maintenance upon an agreement that so doing should not prejudice him if he sued for a divorce on the ground of desertion, it becomes impossible to hold that the decree was a mere registering of an agreement between the parties, and not the judicial action of the court. Certainly, when the papers filed by the husband and wife are considered there is no room for the contention that a judicial finding was not made. True, the paper filed by the husband expressed his desire to avoid such a finding, but, instead of consenting to this proposition, the paper filed by the wife insisted that she was entitled to the finding, that she had always refused to waive it, and that she demanded it. The court obviously considered that the wife was entitled to the right which she thus claimed, since it made the very finding upon which the wife insisted, and which the paper filed by the husband sought to avoid, and the conduct of the husband, in excepting to the finding as made by the court, demonstrates that he regarded it as a judicial determination of the issue of absence of fault on the part of the wife. And the modified order of reference gives rise but to the inference that in view of the admission of the husband it was not deemed necessary, for the purpose of the *trial*, to take further testimony in respect to the conceded fact, or for the master to report in detail concerning the evidence as to the misconduct of the husband which led to the separation. This also explains the statement of the judge, made in the certificate of evidence, as to the controversy regarding the terms of the decree, and his refusal to find that *all* the charges made in the bill had been proven. This view of the matters relied upon by the California court was the one expressly adopted by both the Appellate Court and by the Supreme Court of Illinois in deciding the appeal taken by the husband. On that appeal, as we have said, he complained of the action of the court, including the finding that the wife was living separate without fault on her part. (79 Ill. App. 590; 180 Ill. 481.)

Both of the Illinois courts, in considering the objection that the trial court was without power to make a finding concerning the absence of fault on the part of the wife because of the consent manifested by the paper filed by the husband, treated that paper not as a mere consent to a decree in relation to that subject, but as an admission concerning the state of the proof in the record, which, whilst it rendered it unnecessary for the court to analyze the proof, did not deprive it of the power to make a judicial finding of the fact. It is to be observed also that both courts held that on the issue as to the custody of the minor children and the sum to be allowed for separate maintenance, the inquiry into the conduct of the husband was relevant and required an analysis of the testimony, an analysis which embraced necessarily those elements of proof which entered into the question of the causes of the separation.

But if it be considered that in any aspect the decree under review was a consent decree, we are of opinion that the cases relied upon by the Supreme Court of California (*Wadhams* v. *Gay*, 73 Ill. 417; *Farwell* v. *Great Western Tel. Co.*, 161 Ill. 522,) are not authoritative upon the proposition that such decree would not in the courts of Illinois have the effect of *res judicata*. The first of the cases—considered by this court in *Gay* v. *Parpart*, (106 U. S. 689 *et seq.*)—dealt merely with the right of a court of equity to refuse to lend its aid to enforce an incomplete and ineffective decree in partition proceedings, because to do so would be inequitable. In the second of the cases it was but decided that a fraudulent decree might be set aside in a court of equity.

The general rule in Illinois undoubtedly is that a consent decree has the same force and effect as a decree *in invitum*. (*Knobloch* v. *Mueller*, 123 Ill. 554; *O'Connell* v. *Chicago Terminal Ry.*, 184 Ill. 308, 325.) Thus, in *Knobloch* v. *Mueller*, the court said (123 Ill. 565):

"Decrees of courts of chancery, in respect of matters within their jurisdiction, are as binding and conclusive upon the parties and their privies as are judgments at law; and a decree by consent in an amicable suit has been held to have an additional claim to be considered final. (*Allason* v. *Stark*, 9 Adol. & E. 255.) Decree so entered by consent cannot be reversed, set aside, or impeached by bill of review or bill in the nature of a bill of review, except for fraud, unless it be shown that the consent was not in fact given, or something was inserted, as by consent, that was not consented to. (2 Daniell, Ch. Pr. 1576; *Webb* v. *Webb*, 3 Swanst. 658; *Thompson* v. *Maxwell*, 95 U. S. 391; *Armstrong* v. *Cooper*, 11 Ill. 540; *Cronk* v. *Trumble*, 66 Ill. 432; *Haas* v. *Society*, 80 Ill. 248; *Atkinson* v. *Manks*, 1 Cow. 693; *Winchester* v. *Winchester*, 121 Mass. 127; *Allason* v. *Stark*, 9 Adol. & E. 225; *Earl of Hopetoun* v. *Ramsay*, 5 Bell, App. Cas. 69.) See, also, note to *Duchess of Kingston's* (2 Smith, Lead. Cas. *826 *et seq.*) It is the general doctrine that such a decree is not reversible upon an appeal or writ of error, or by bill of review for error. (*Armstrong* v. *Cooper*, 11 Ill. 540.)"

And the assertion that the particular matters relied upon in this cause are of such a character as to take this case out of the rule just stated, is conclusively shown to be without merit by the decision of the appellate court and the Supreme Court of Illinois, affirming the decree of separation and the finding therein made.

In the argument at bar there is a ground taken which was not referred to in the opinion of the Supreme Court of California, which it is insisted shows that that court was right in its decision, although the reasoning of its opinion may be conceded to have been erroneous. That ground is this. In Illinois it is contended it has been settled that a decree in a suit for separate maintenance is not *res judicata* in a suit for divorce on the ground of desertion, and *vice versa*, therefore the Illinois decree should not have been given in California any greater effect. Two cases are relied upon. (*Wahle* v. *Wahle*, 71 Ill. 510, and *Umlauf* v. *Umlauf*, 117 Ill. 584.) But these cases do not sustain the proposition based on them. In the Wahle case the husband had sued his wife for divorce on the ground of abandonment, and she, in addition to answering, had filed a cross bill charging the husband with cruelty and adultery, and praying for separate maintenance. The principal cause was first heard and decided adversely to the husband. Subsequently the cross bill was heard and a decree of dismissal was rendered. This was alleged to be error, on the ground that the verdict of the jury on the issue of divorce, in favor of the wife, was a judicial determination, establishing the facts alleged in her cross bill, and justifying her in living apart from her husband. But the Supreme Court of Illinois held that as the verdict of the jury in the divorce suit was general, and did not indicate upon what particular finding it was based, the court could not know upon what fact the jury were induced to find as they did, and that in consequence the bill did not necessarily establish that the separation of the parties was without fault on the part of the wife, since the verdict might have proceeded upon either of the following grounds: 1, that the abandonment was for less than two years; 2, that it was by mutual consent; or, 3, that it was induced by the acts of the husband, whatever might have been the fault of the wife.

In *Umlauf* v. *Umlauf*, the wife filed a bill for separate maintenance but failing to establish her right the bill was dismissed. Subsequently the husband filed a bill for divorce, charging willful desertion by the wife from the date of the filing of her bill against him for separate maintenance. Upon the hearing of the divorce case the court admitted in evidence against the objection of the wife the pleadings and the decree against her in the suit for separate maintenance, and also excluded all evidence on her part tending to disprove the charge of desertion. From a judgment granting the divorce the wife appealed. The Supreme Court of Illinois prefaced its consideration of the question with the following statement (p. 484):

"No principle is better settled than that where a question, proper for judicial determination, is directly put in issue, and finally determined in a legal proceeding by a court having competent authority and jurisdiction to hear and determine the same, such decision and determination of the question will be deemed final and conclusive upon the parties and their privies in all litigation between them in which the same question arises, so long as the judgment remains reversed or is not otherwise set aside

But the court held that these elementary principles did not apply, because the decree against the wife in the separate maintenance suit was general and might have been entered solely upon the ground that the wife was not without fault, leaving undecided the question whether the husband was in any way at fault, and, therefore, there was not identity, and resulting *res judicata.*

The inappositeness of these cases to the present one becomes obvious when it is recalled that in this case there was a decree not against but in favor of the wife in the maintenance suit, which decree necessarily conclusively settled that the separation was for cause and was without fault on the part of the wife, and therefore was not a willful desertion of the husband by the wife, which is the precise issue in the divorce case now here.

In the brief of counsel it is stated that under the law of California, if a wife is living apart from her husband under circumstances which do not constitute desertion, yet such living apart may become desertion if the husband in good faith invites the wife to return and she does not do so. In this connection reference is made to certain requests proffered by the husband for the wife to return, which it is urged caused the separation to become desertion under the California law. But conceding, without deciding, that the California law is as asserted, the proposition of fact upon which the argument rests amounts simply to denying all effect to the Illinois decree. This follows, because all the requests to return referred to were made in Illinois before the entry of the final decree in the suit for separate maintenance, were referred to in the answer in that case, and were adversely concluded by the judgment which was rendered. (*Johnson* v. *Johnson*, 125 Ill. 510.)

Having thus disposed of all the contentions based upon the assumed consent under the decree for separate maintenance or the asserted limitations to such a decree, based upon the law of Illinois, we are brought to consider the final question which is, Was the decree in favor of the wife for separate maintenance entered in the Illinois case conclusive upon the husband in the courts of California of the issue of willful desertion? That the issue of willful desertion present in the divorce action was identical with the issue of absence without fault presented in the Illinois maintenance suit, is manifest. The separation asserted by the wife in her bill for separate maintenance to have been without her fault was averred to have taken place on February 1, 1890, and such separation was stated by the

husband in his answer to the bill to have been an abandonment and desertion of him. The willful desertion charged in the complaint in this action for divorce was averred to have been committed "on or about the month of February, 1890, and to have been continuous thereafter." And the identity between the two is further demonstrated by the circumstance that the evidence taken in the Illinois case bearing upon the cause for the separation was used upon the trial in this case. The question in each suit, therefore, was whether the one separation and living apart was by reason of the fault of the wife. From the standpoint of a decree in favor of the wife in the suit for separate maintenance the issues raised and determined were absolutely identical.

The controversy before us is, in some respects, like that which was considered in *Barber* v. *Barber*, (21 How. 582.) There a bill was filed in a Federal court in Wisconsin to enforce judgment for alimony under a decree of separation *a mensa et thoro*, rendered against a husband in New York. It was shown by the evidence that to avoid the payment of the alimony the husband had left the State of New York, the matrimonial domicil, and taken up his residence in the State of Wisconsin, where he obtained a decree of divorce on the ground of desertion by the wife. Whilst this court refrained from expressing an opinion as to the legality of the Wisconsin decree of divorce obtained under these circumstances, it enforced the New York judgment for alimony, and held it to be binding. And that it was considered that the judgment in New York legalizing the separation precluded the possibility that the same separation could constitute willful desertion of the wife by the husband, plainly appears from the following excerpt from the opinion—italics mine (p. 588):

"It also appears from the record that the defendant had made his application to the court in Wisconsin for a divorce *a vinculo* from Mrs. Barber without having disclosed to that court any of the circumstances of the divorce case in New York, and that, *contrary to the truth, verified by that record*, he asked for the divorce on account of his wife having willfully abandoned him."

So also the courts of Massachusetts have held the fact to be that a separation legalized by judicial decree was a conclusive determination that the same separation was not willful desertion. Thus in *Miller* v. *Miller*, (150 Mass. 111,) explicitly approved in *Watts* v. *Watts*, (160 Mass. 464,) after holding that an adjudication of a probate court that a wife is living apart from her husband for justifiable cause, was a bar to an action by the husband for divorce on the ground of utter desertion, the court, speaking of the decree of the probate court, said:

"The fact determined by it is inconsistent with the necessary allegation in the libel that the libelee previously had utterly deserted the libellant, and was then continuing such desertion. Utter desertion, which is recognized by the statute as a cause for divorce, is a marital wrong. Because

the deserter is a wrongdoer, the law gives the deserted party a right to a divorce. If a wife leaves her husband for a justifiable cause it is not utter desertion within the meaning of the statute, and a wife who has utterly deserted her husband, and is living apart from him in continuance of such desertion, cannot be found to be so living for justifiable cause. (*Pidge* v. *Pidge*, 3 Metc. 261; *Fera* v. *Fera*, 98 Mass. 155; *Lyster* v. *Lyster*, 111 Mass. 327.) The court should have ruled as requested by the libelee, that the decree of the probate court was a bar to the maintenance of this libel. Exceptions sustained."

We are of opininon that the final decree of July 26, 1897, entered in the Circuit Court of Cook County, Illinois, in legal effect established that the separation then existing and which began contemporaneously with the filing of the bill in that cause in February, 1890, was lawful, and therefore conclusively operated to prevent the same separation from constituting a willful desertion by the wife of the husband. From these conclusions it necessarily follows that the issue presented in this action for divorce was identical with that decided in the suit in Illinois for separate maintenance. This being the case it follows that the Supreme Court of California in affirming the judgment of divorce failed to give to the decree of the Illinois court the due faith and credit to which it was entitled, and thereby violated the Constitution of the United States.

The judgment of the Supreme Court of California must therefore be reversed, and the cause be remanded for further proceedings not inconsistent with this opinion.

And it is so ordered.

Mr. Justice BROWN concurs in the result.

True copy.

Test:

Clerk Supreme Court, U. S.